Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-389

CARL E. PERSON,

Petitioner,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 12, 1977

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Carl E. Person, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, rendered in this action on April 29, 1977.

OPINIONS BELOW

The Memorandum and Order dated dated March 24, 1976 by the District Court for the Eastern District of New York (Dooling, J.) is reported at 414 F. Supp. 139 and is reproduced in Appendix A to this petition. The Memorandum and Order dated June 25, 1976 by Judge Dooling is reported at 414 F. Supp. 144 and is reproduced in Appendix B to this petition. The Memorandum and Order dated August 10, 1976 by Judge Dooling, not reported, is reproduced in Appendix C to this petition. The opinion of Circuit Judge Smith of the United States Court of Appeals for the Second Circuit, decided April 29, 1977, is reported at 554 F.2d 534 and is reproduced in Appendix E to this petition.

JURISDICTION

The decision of the Court of Appeals for the Second Circuit reversing the judgment of the District Court and dismissing the action was made and filed on April 29, 1977. See Appendix E, p. 40a, infra. Petitioner's petition for a rehearing en banc was denied by two orders each dated June 14, 1977. See Appendices F and G, pp. 64a and 66a, infra. The jurisdiction of this Court in invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Disciplinary Rule DR 7-109C of the American Bar Association ("ABA") Code of Professional Responsibility, adopted in New York State and in almost all other states[1], prohibits each attorney from using or acquiescing in the use of

.....

1. See n. 3 to Casenote, "Professional Responsibility - A Constitutional Challenge to Disciplinary Rule 7-109(C)", 55 N.C.L.Rev. 709 (Apr. 1977).

an expert witness on a contingent-fee basis, no matter how reasonable the contingent compensation may be, and irrespective of the financial condition of the party, the type of lawsuit, or his need to experts to prepare for testifying, and to testify.

Violation of the rule by an attorney is professional misconduct under § 90(2) of the New York Judiciary Law, but the prohibition does not apply to the experts themselves, the clients of an attorney, or parties in litigation acting on a pro se basis. Also, the rule does not prohibit certain contingencies having far greater prospective monetary value, such as a substantial ongoing business relationship between the expert witness and the attorney who retained him or the attorney's client.

The rule was adopted by bar associations controlled by attorneys for major corporations

which benefit from the rule (by reducing the possibility that plaintiffs with meritorious cases will succeed in litigation against the corporation), and there was no independent legislative or judicial review of the rule in New York.

Because of the prohibition of DR 7-109C, Petitioner, as attorney for 10 plaintiffs in a major federal antitrust action (the "Nabcor action") against General Motors Corporation ("GM") and numerous others, was not able to employ the services of any expert witnesses to prepare for and then testify at an evidentiary hearing or at the trial.

This inability to employ expert witnesses in opposition to the substantial amount of expert preparation and testimony used by GM caused Petitioner's clients to lose, in 1973, a

critical motion for a preliminary injunction to stop GM from interfering with the clients' sources of supply of new automobiles, on a "fleet" basis, from willing GM dealers.

The trial in the Nabcor Action was held during October, November and early December, 1976, and the action was dismissed, at the end of the plaintiffs' case, for alleged insufficiency of evidence. The plaintiffs in the Nabcor action had no expert witnesses to testify at the trial for the above reasons. (An appeal is pending in the Second Circuit under Docket No. 77-7037.)

The questions presented are:

I. Whether DR 7-109C, prohibiting use of expert witnesses on a contingent-fee basis, is irrational and in violation of the Equal Protection clause of the fourteenth amendment because the rule:

(a) makes directly conflicting assumptions about whether a reasonable fee for testifying could induce an expert witness to commit perjury;

(b) makes directly conflicting assumptions about the need for contingent fees to attorneys and expert witnesses and whether the use of either of such types of contingent fees would induce the attorney to suborn perjury;

(c) prohibits all types of contingent fees to expert witnesses, whether or not the fees are small or reasonable;

(d) does not regulate expert witnesses or parties to litigation, only the attorney, thereby permitting the attorney's client or unrepresented parties to use expert witnesses on a contingent-fee basis, reasonable or unreasonable (if the attorney is not involved);

(e) does not prohibit an expert witness from owning shares of stock in the client or from buying a percentage of the claim itself;

(f) does not prohibit an attorney from using expert witnesses who have more substantial contingencies in the form of ongoing business relationships and expectations; and

(g) does not prohibit a party or its employees and shareholders from testifying as an expert witness.

II. Whether DR 7-109C, prohibiting the use of expert witnesses on a contingent-fee basis, impermissibly interferes with substantial rights of petitioner and his clients, and is a denial of equal protection under the fourteenth amendment because the rule:

(a) prevents them from having the access to the courts they need to obtain an

injunction to stop, and to recover for, the illegal activities of major corporations which are destroying the business and property of the clients;

(b) does not permit petitioner or his clients to make any showing of need to use expert witnesses on a contingent-fee basis; and

(c) prevents petitioner from introducing opinion testimony on the ultimate facts in issue under Rule 704, Federal Rules of Evidence, thereby giving wealthy defendants a substantial, unfair and unnecessary advantage.

III. Whether DR 7-109C, prohibiting the use of expert witnesses on a contingent-fee basis, is a denial of procedural and, as applied, substantive due process under the fourteenth amendment because the rule:

(a) was adopted by persons having a substantial interest in the prohibition without independent review by the New York legislature or judiciary;

(b) impermissibly interferes with the fundamental property rights of petitioner's clients to obtain a court injunction against, and damages from, persons who, through violations of federal antitrust laws, are destroying business and property interests of petitioner's clients;

(c) deprives petitioner and his clients of the use of their own property (the claim in litigation) to finance the litigation without permitting them an opportunity to show need to hire expert witnesses on a contingent-fee basis; and

(d) deprives them of the substantial advantages of Rule 704, Federal Rules

of Evidence, permitting opinion testimony on ultimate issues, which testimony would have been sufficient to prevent the Nabcor action from having been dismissed for alleged insufficiency of evidence.

IV. Whether DR 7-109C, prohibiting the use of expert witnesses on a contingent-fee basis, violates the first amendment, through the fourteenth amendment, by the overbreadth doctrine and unconstitutional application of the rule, because of its substantial and unjustified interference with first amendment freedoms:

(a) to petition the courts for a redress of grievances as to antitrust claims for injunctive and monetary relief; and

(b) to engage as a private attorney general in peaceable assembly and political

(antitrust) litigation in association between petitioner and his clients without any opportunity to make a showing of economic need to use expert witnesses on a (reasonable) contingent-fee basis.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Peaceful Assemblage clause in the first amendment to the United States Constitution provides:

> "Congress shall make no law ... abridging ... the right of the people peaceably to assemble...."

The Petition clause in the first amendment to the United States Constitution provides:

> "Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances."

The Due Process clause in § 1 of the fourteenth amendment to the United States Constitution provides:

> "... nor shall any State deprive any person of life, liberty, or property, without due process of law...."

The Equal Protection clause in § 1 of the fourteenth amendment to the United States Constitution provides:

> "... nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws."

The statute describing when cases in the courts of appeals may be reviewed by the Supreme Court, 28 U.S.C. § 1254, reads in pertinent part as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

The statute providing jurisdiction to the District Court to hear civil actions, 28 U.S.C. § 1343, reads in pertinent part as follows:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of

Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

The statute providing for declaratory judgments, 28 U.S.C. § 2201, reads in pertinent part:

"Creation of remedy

"In a case of actual controversy within its jurisdiction, ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be

reviewable as such." Unchanged by amendment effective Oct. 4, 1976.

The statute providing petitioner with the right to sue for denial of his civil rights, 42 U.S.C. § 1983, provides in pertinent part as follows:

> "§1983. Civil Action for deprivation of rights
>
> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper

> proceeding for redress."

The New York statute making violation of DR 7-109C an act of professional misconduct, § 90(2) of the New York Judiciary Law, published in McKinney's Consolidated Laws of New York, Book 29, reads in pertinent part:

> "The supreme court shall have power and control over attorneys ..., and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney ... who is guilty of professional misconduct..., or any conduct prejudicial to the administration of justice...."

Rule 56(f) of the Federal Rules of Civil Procedure, providing for summary judgments, reads in pertinent part:

"(a) For Claimant. A party seeking to ... obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

Rule 704 of the Federal Rules of Evidence, permitting opinion testimony on ultimate issues, reads:

"Opinion on Ultimate Issue.

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

Disciplinary Rule DR 7-109C of the Code of Professional Responsibility of the ABA adopted by the New York State Bar Association ("DR 7-109C"), published in McKinney's Consolidated Laws of New York, Book 29, Judiciary Law, Appendix at 351, 499, reads:

"A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

"1. Expenses reasonably incurred by a witness in attending or testifying.

"2. Reasonable compensation to a witness for his loss of time in attending or testifying.

"3. A reasonable fee for the professional services of an expert witness."

ABA Canon 39, originally adopted on July 26, 1928 and a predecessor to DR 7-109C, stated:

"Compensation demanded or received by any witness in excess of statutory allowances should be disclosed to the court and adverse counsel. If the ascertainment of truth requires that a lawyer should seek information from one connected with or reputed to be biased in favor of an adverse party, he is not thereby deterred from seeking to ascertain the truth from such person in the interests of his client."

ABA Canon 39 was amended in 1937 to read:

"A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party. In doing so, however, he should scrupulously avoid any suggestion calculated to induce the witness to suppress

or deviate from the truth, or in any degree to affect his free and untrammelled conduct when appearing at the trial of in the witness stand."

The court rule which makes a violation of DR 7-109C professional misconduct, § 603.2 of the Rules of the First Department of the Appellate Division of the Supreme Court of the State of New York, reads in relevant part:

"Professional Misconduct Defined

"Any attorney who ... violates ... any Disciplinary Rule of the Code of Professional Responsibility, as adopted by the New York State Bar Association, effective Jan. 1, 1970, as amended, or any Canon of the Canons of Professional Ethics, as adopted by such bar association and effective until Dec. 31, 1969 ... shall be deemed to be guilty of professional misconduct within the meaning of subdivision 2 of section 90 of the

Judiciary Law. ..."

The court rule which makes a violation of DR 7-109C professional misconduct (in the Eastern District of New York), § 691.2 of the Rules of the Second Department of the Appellate Division of the Supreme Court of the State of New York, reads in relevant part:

> "Professional Misconduct Defined
>
> "Any attorney who ... violates ... any disciplinary rule of the Code of Professional Responsibility, as adopted by the New York State Bar Association, or any canon of the Canons of Professional Ethics, as adopted by such bar association ... shall be deemed to be guilty of professional misconduct within the meaning of subdivision (2) of section 90 of the Judiciary Law."

STATEMENT OF FACTS

1. Procedural Background

The case originated upon the filing of a complaint in the United States District Court for the Eastern District of New York to enjoin enforcement of DR 7-109C, which prohibits attorneys from using or acquiescing in the use of expert witnesses on a contingent-fee basis, however reasonable. Petitioner alleged a violation of his civil rights under 42 U.S.C. § 1983 and alleged that the basis for jurisdiction was 28 U.S.C. § 1343(3). After denial of petitioner's motion for a preliminary injunction, petitioner moved to amend his complaint to allege an action for declaratory judgment under 28 U.S.C. § 2201, which motion was granted by Memorandum and Order dated June 25, 1976 (Appendix B hereto). Petitioner then moved for a summary declaratory judgment under Rule 56(f), F.R.Civ.P., to declare DR 7-109C unconstitutional, and the motion was granted by Memorandum and

Order dated August 10, 1977 (Appendix C hereto), and judgment was entered on August 12, 1976 (Appendix D hereto).

Respondents other than The Association of the Bar of the City of New York appealed from the judgment of the District Court, and the Second Circuit reversed the judgment and dismissed the action on April 29, 1977 (see Opinion of Second Circuit at Appendix E hereto), and denied petitioner's petition for a rehearing en banc at the same time (see Appendices F and G hereto).

2. Nabcor Antitrust Action

Petitioner, an antitrust attorney, represents 10 plaintiffs in a major antitrust action against General Motors Corporation ("GM"), General Motors Acceptance Corporation, Ford Motor Company, Chrysler Corporation, American Motors Corporation and various other defendants. This action, the "Nabcor action", was commenced in

the Southern District of New York during December, 1970 under the name National Auto Brokers Corp. v. General Motors Corp., index number 70 Civ. 5421, and was subsequently severed into 4 separate actions. The plaintiffs in the Nabcor action have charged GM and the other defendants with a conspiracy (i) to boycott Nabcor by cutting off Nabcor's sources of supply of new cars and (ii) to fix retail prices. The Nabcor plaintiffs seek $100,000,000 in damages (before trebling) for themselves, not as a class action, for the total destruction of their unique new businesses of distributing any make and model of new automobile through an automobile "brokerage" system in competition with the franchised distribution system of GM and the other auto manufacturers. Also, the Nabcor plaintiffs seek a permanent injunction to stop the illegal activities alleged.

It was essential for the Nabcor plaintiffs to retain expert witnesses to prepare to testify and then to testify during a 1973 evidentiary hearing on plaintiffs' preliminary injunction motion to enjoin GM from interfering with Nabcor's purchasing of new cars from willing GM dealers on a "fleet" (i.e., low-cost) basis. However, Nabcor and the other plaintiffs were unable to afford needed expert witnesses, and lost the critical motion, which caused Nabcor and its 200 franchisees to go out of business. GM, on the other hand, submitted extensive reports prepared by a major accounting firm (Price, Waterhouse & Co.) retained by GM's attorneys, the New York firm of Paul, Weiss, Rifkind, Wharton & Garrison. A partner of Price, Waterhouse testified at the evidentiary hearing. Also, the accounting firm or its partners were retained to testify at trial as expert witnesses on behalf of GM and other defendants. Price, Waterhouse & Co. had substantial business

relationships of a continuing nature with GM, GM's attorneys and other defendants which made their compensation contingent to the extent the firm risked the loss of further business from such defendants and attorneys in subsequent litigated or non-litigated matters, including the 4 or more trials expected to be held in the Nabcor action, if the accounting firm's "expert" testimony failed to meet the requirements or satisfaction of GM or GM's attorneys. During the evidentiary hearing, the firm partner admitted that the firm's preparation and his related testimony for GM was done contrary to generally accepted accounting principles.

Because of the prohibition of DR 7-109C, petitioner was unable to retain any expert witnesses to perform preparation work prior to trial, in the areas of accounting, economics, marketing, franchising and automobile distribu-

tion, and therefore had no expert witnesses prepared to testify at trial. The needed expert witnesses requested non-contingent compensation of about $100,000 or more, which petitioner's clients could not afford. This financial inability was allegedly caused by the violations of federal antitrust law alleged in their antitrust complaint.

The first of the 4 severed Nabcor actions (the GM action) was dismissed after the plaintiffs' case by the District Court in December, 1976, after 6 weeks of trial, the judge determining that the plaintiffs had insufficient evidence to submit to the jury as to liability or damages. An appeal is pending in the Court of Appeals for the Second Circuit under Docket No. 77-7037. National Auto Brokers Corp. v. General Motors Corp., 70 Civ. 5421A (USDC SDNY), appeal pending in 2nd Cir. under Docket No. 77-7037.

The use of expert witnesses in both of such areas could have prevented the court's determination of insufficiency. See Rule 704 of the Federal Rules of Evidence which permits opinion testimony on the ultimate issue to be decided by the trier of fact.

3. Antitrust Law Enforcement Is Political Activity

Petitioner has proven that enforcement of the antitrust laws by the Department of Justice and New York Attorney General is done on a discretionary basis, with major reliance upon private actions to enforce the federal and state antitrust laws. The Justice Department and New York Attorney General refused to take action against GM or any of the other defendants in the Nabcor action when asked to do so by the Nabcor plaintiffs and petitioner. Because of this refusal to assist, petitioner and his Nabcor clients are performing a political activity of

government, enforcing the antitrust laws, and are recognized as "private attorneys general" under decisions of this Court.

In his complaint, petitioner alleged that he and his Nabcor clients have assembled in the Nabcor action as a political association to enforce the antitrust laws against GM and the other defendants.

Petitioner has proven that the concentration of wealth in this country is at a dangerously high level, and our form of government depends on how effective the nation's antitrust laws are enforced. Enforcement of the antitrust laws has substantial political ramification in this country.

Petitioner has proven that antitrust litigation is very costly in most cases, with the plaintiffs in an antitrust action often

having insufficient funds available to adequately present their case in court, even if they are able to retain an attorney on a contingent-fee basis, unless the plaintiffs can use a portion of their claim to finance the suit. Also, existence of the rule inhibits attempts to find counsel willing to take the action on a contingent-fee basis for himself.

4. DR 7-109C Prevented Substantial Justice for the Nabcor Plaintiffs

Because of the high cost of retaining needed expert witnesses in the Nabcor action, and the existence of DR 7-109C (prohibiting attorneys from using expert witnesses on any kind of contingent-fee basis, however reasonable), petitioner and his 10 Nabcor clients were unable, in petitioner's professional opinion as an attorney, to obtain substantial justice in the Nabcor private antitrust action, which denial continues to this day.

5. New York's Automatic Adoption of DR 7-109C

DR 7-109C was promulgated by the ABA during 1969. Its immediate predecessor, Canon 39 (1937 version) did not prohibit the use of expert witnesses on a contingent-fee basis; nor did the prior version of Canon 39, adopted in 1908. DR 7-109C of the ABA was adopted in 1970 by the New York State Bar Association, violation of which Rule is professional misconduct under § 90(2) of the New York Judiciary Law and Rules § 603.2 and § 691.2 of the First and Second Departments of Appellate Division of the New York Supreme Court.

New York's adoption of the ABA Code, including DR 7-109C, occurred automatically and without any prior legislative or judicial review and without any attempt to balance the interests at stake. The ABA, New York State Bar Association and defendant, The Association of the Bar of the City of New

York are dominated or controlled by partners in law firms representing major business interests which benefit from the adoption and enforcement of DR 7-109C. The rule inhibits persons such as petitioner and his antitrust clients from proving meritorious claims against these same major companies. Furthermore, these business interests have combined on a political-action basis to prevent effective antitrust law enforcement (through The Business Roundtable, consisting of the chief executive of the top 158 corporations, including GM, Ford and Chrysler, and was founded by a top partner in the law firm representing The Association of the Bar of the City of New York). The Business Roundtable is even financing the defense of litigation for companies not members of The Business Roundtable.

6. No Issues of Fact

Petitioner's facts are unrefuted. Respondents filed no affidavits in opposition to the

petitioner's affidavits (other than attorneys' affidavits), and respondents did not seek any discovery. The judgment of the District Court "was based exclusively on the affidavits of plaintiff and the pleadings".

REASONS FOR GRANTING THE WRIT

Petitioner submits that this Court should grant this petition for the following reasons: The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

I.

DR 7-109C, prohibiting the use of expert witnesses on a contingent-fee basis, is irrational and in violation of the Equal Protection clause of the fourteenth amendment because the rule:

(a) makes directly conflicting assumptions about whether a reasonable fee for

testifying could induce an expert witness to commit perjury;

(b) makes directly conflicting assumptions about the need for contingent fees to attorneys and expert witnesses and whether the use of either of such types of contingent fees would induce the attorney to suborn perjury;

(c) prohibits all types of contingent fees to expert witnesses, whether or not the fees are small or reasonable;

(d) does not regulate expert witnesses or parties to litigation, only the attorney, thereby permitting the attorney's client or unrepresented parties to use expert witnesses on a contingent-fee basis, reasonable or unreasonable (if the attorney is not involved);

(e) does not prohibit an expert witness from owning shares of stock in the client or from buying a percentage of the claim

itself;

(f) does not prohibit an attorney from using expert witnesses who have more substantial contingencies in the form of ongoing business relationships and expectations; and

(g) does not prohibit a party or its employees and shareholders from testifying as an expert witness.

Irrationality is one basis for declaring a rule unconstitutional, [illegible] a denial of equal protection under the fourteenth amendment. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312 (1976) and San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 44-53 (1973).

DR 7-109C, as adopted by the New York State Bar Association effective in 1970, was contrary

to existing case law in New York permitting payment of contingent fees to certain types of expert witnesses. See Marine Midland Trust Co. of New York v. Forty Wall Street Corp., 13 A.D.2d 118, 213 N.Y.S.2d 689 (1st Dept. 1961), aff'd, 11 N.Y.2d 679 (1962).

Paragraph "(a)" of the above-listed irrationalities is discussed by Judge Dooling at 29a-32a. The rule is irrational as well because of the other 6 reasons (b-g). The rule would be rational, possibly, only if "contingency" referred to a percentage of the recovery, rather than to include a reasonable fee paid only in the event of success of the litigation.

Also, the rule prevents an attorney from advising his client on how to proceed himself to use an expert witness on a contingent-fee basis. This would seem to be a basis itself for

declaration of unconstitutionality, through its denial of counsel to a client, particularly because it would be professional misconduct to inform the client what the attorney is not permitted to participate in.

Judge Dooling held that New York did not prevent all types of transfers of interests in lawsuits, and that petitioner should request a ruling from the ethics committee of the defendant bar association on the ethical propriety (as distinguished from the legality) of selling shares in lawsuits. Thereafter, during June, 1976, the Securities and Exchange Commission permitted a client of petitioner to make a public offering of shares in a lawsuit under Regulation A. New York law does not prohibit an expert witness from owning shares in the lawsuit in which he is to testify as an expert. In fact, under New York law, petitioner's clients could have sold shares in the lawsuit to

expert witnesses, then return the cash to them as a "non-contingent" fee permissible under DR 7-109C, under the decision of the Second Circuit, because only literal contingent fees (and not variations thereon) are prohibited by the rule. See 58a.

II.

DR 7-109C, prohibiting the use of expert witnesses on a contingent-fee basis, impermissibly interferes with substantial rights of petitioner and his clients, and is a denial of equal protection under the fourteenth amendment because the rule:

(a) prevents them from having the access to the courts they need to obtain an injunction to stop, and to recover for, the illegal activities of major corporations which are destroying the business and property of the clients;

(b) does not permit petitioner or his clients to make any showing of need to use

expert witnesses on a contingent-fee basis; and

(c) prevents petitioner from introducing opinion testimony on the ultimate facts in issue under Rule 704, Federal Rules of Evidence, thereby giving wealthy defendants a substantial, unfair and unnecessary advantage.

The rule prevents petitioner and his clients from protecting their property and from recovering damages for injury already suffered. United States v. Kras, 409 U.S. 434 (1973) is clearly inapplicable. See Judge Dooling's opinion at 26a and The Supreme Court, 1972 Term, 1973, 87 Harv.L.Rev. 1, 57-67. Kras had other alternatives and he was looking to obtain a benefit granted by statute. Petitioner and his clients are seeking to obtain an injunction, which only the courts can

grant, and they are looking to protect property from being destroyed by illegal activity, which the federal and state regulatory authorities have refused to stop themselves. Accordingly, the courts are the only effective remedy, and the case falls squarely within Boddie v. Connecticut, 401 U.S. 371 (1971) and Winters v. Miller, 446 F.2d 65, 71 (2nd Cir. 1971); cert. denied, 404 U.S. 985 (1971). Ortwein v. Schwab, 410 U.S. 656, 658-59 (1973) is not applicable because of the availability of another remedy and interests of less constitutional significance, involving reduced welfare payments. The interest of the Nabcor plaintiffs was their own business and property, protected by the fourteenth amendment.

III.

DR 7-109C, prohibiting the use of expert witnesses on a contingent-fee basis, is a denial

of procedural and, as applied, substantive due process under the fourteenth amendment because the rule:

(a) was adopted by persons having a substantial interest in the prohibition without independent review by the New York legislature or judiciary;

(b) impermissibly interferes with the fundamental property rights of petitioner's clients to obtain a court injunction against, and damages from, persons who, through violations of federal antitrust laws, are destroying business and property interests of petitioner's clients;

(c) deprives petitioner and his clients of the use of their own property (the claim in litigation) to finance the litigation without permitting them an opportunity to show need to hire expert witnesses on a contingent-fee

basis; and

(d) deprives them of the substantial advantages of Rule 704, Federal Rules of Evidence, permitting opinion testimony on ultimate issues, which testimony would have been sufficient to prevent the Nabcor action from having been dismissed for alleged insufficiency of evidence.

The substantial financial interest of the persons controlling the various bar associations which adopted DR 7-109C and their major-corporate clients should disqualify these bar associations from adopting DR 7-109C on the grounds of self interest, which is a denial of procedural due process. Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Ass'n, 96 S.Ct. 2308 (1976).

The rule is absolute even though the need for expert witnesses in litigation is increasing, because of the increased complexity of our society, and the need for experts ranges widely, depending on the type of case, the type of expert testimony needed, the amount of money involved, and other factors too complex to sweep away with a total prohibition.

The rule does not permit any opportunity needy parties or their attorneys to show to the court their particularized need to use expert witnesses on a reasonable contingent-fee basis.

Thus, persons are deprived, without due process, of the use of their own property (the litigated claim) to finance pursuit of the claim.

Justice is slowed down by the need in such instances for an impecuneous plaintiff to

prove his case using a more tedious route, contributing to courtroom congestion, assuming in some instances there may be this alternative. The rule itself prevents persons from ascertaining whether an expert could develop information based on which he could give his opinion testimony on the ultimate or other facts in issue. By permitting plaintiffs to use expert testimony (and most plaintiffs cannot now afford to), much of the work would be done before trial, not involving the courts, by the respective experts, which would tend to identify and simplify the issues more quickly, and result in shorter trials and possibly more out of court settlements of meritorious claims.

For a discussion of Judge Dooling's decision in this action see Casenote, "Professional Responsibility - A Constitutional Challenge to Disciplinary Rule 7-109(C)", 55 N.C.L.Rev. 709-21 (Apr. 1977); and Casenote, "Legal Ethics -

Contingent Fees to Expert Witnesses - Is Disciplinary Rule 7-109(C) Dead?", 81 Dick. L. Rev. 655-661 (Spr. 1977). Also, see Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights (pt. 1), 1973 Duke L.J. 1153, 1154-1169.

IV.

DR 7-109C, prohibiting the use of expert witnesses on a contingent-fee basis, violates the first amendment, through the fourteenth amendment, by the overbreadth doctrine and by unconstitutional application of the rule, because of its substantial and unjustified interference with first amendment freedoms:

(a) to petition the courts for a redress of grievances as to antitrust claims for injunctive and monetary relief; and

(b) to engage as a private attorney general in peaceable assembly and political

(antitrust) litigation in association between petitioner and his clients without any opportunity to make a showing of economic need to use expert witnesses on a (reasonable) contingent-fee basis.

Private enforcement activities in connection with the antitrust laws make the enforcers "private attorneys general" under decisions of this Court. Alyeska Pipeline Service Co. v. Wilderness Society, 95 S.Ct. 1612, 1624 (1975). Also, some litigation is political, protected by the 1st Amendment. NAACP v. Button, 371 U.S. 415 (1963).

Because the Justice Department and New York Attorney General enforce the federal and New York State antitrust laws on a discretionary basis, their decision to enforce or not is political; and the enforcement of such laws on a private basis by private attorneys general

such as petitioner and his clients is also associational political activity of the NAACP v. Button type.

Petitioner argues that DR 7-109C interferes impermissibly with his associational (political) freedom under the first amendment to engage in political litigation enforcing the nation's antitrust laws free from the substantial interference of DR 7-109C.

The State has performed no balancing of interests under Bigelow v. Commonwealth of Virginia, 421 U.S. 809 (1975).

Also, because of the involvement of petitioner's first amendment rights to petition and to peaceably assemble for political purposes, DR 7-109C is unconstitutional as applied, or it is unconstitutional under the overbreadth

doctrine. Dandridge v. Williams, 397 U.S. 471, 484 (1970).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Carl E. Person, Petitioner,
Pro Se
132 Nassau Street
New York, N.Y. 10038

September 12, 1977

APPENDIX A - MEMORANDUM AND ORDER DATED MARCH 24, 1976 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- X

CARL E. PERSON,

Plaintiff, :

-against-

: 75 C 1473
THE ASSOCIATION OF THE BAR : MEMORANDUM
OF THE CITY OF NEW YORK, : and
SUPREME COURT, APPELLATE : ORDER
DIVISION, FIRST DEPARTMENT, :
SUPREME COURT, APPELLATE
DIVISION, SECOND DEPARTMENT, and:
ATTORNEY GENERAL OF NEW YORK
STATE, :

Defendants.
- X

Appearances:

CARL E. PERSON, Esq., plaintiff pro se

HALIBURTON FALES, 2d Esq. (Messrs. WHITE & CASE and ROBERT H. HAILE, Esq. of Counsel) for The Association

DANIEL M. COHEN, Esq. (LOUIS J. LEFKOWITZ, Esq., Attorney General, of Counsel) for defendants other than the Bar Association, and for the Attorney General under Executive Law, § 71

DOOLING, D.J.

Plaintiff has applied for the convening of a

APPENDIX A - MEMORANDUM AND ORDER DATED MARCH 24, 1976 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

three judge court (28 U.S.C. § 2281) on the basis that the second count of the complaint challenges on constitutional grounds the validity of certain sections of the Judiciary Law of New York as implemented through the rules of the Appellate Divisions and the Lawyer's Code of Professional Responsibility. Broadly, plaintiff, a lawyer, contends that, as implemented and threatened to be applied, the statutes, rules and code stifle the prosecution and fair trial of litigation (such as antitrust triple damage cases) by making impossible the financing of such costly litigation. Plaintiff particularly points to the canons of professional conduct that, in substance, forbid the transfer for value of shares in the rights of action, and forbid the retention of expert witnesses whose compensation would be contingent on the success of the suit and would be measured upon the amount of

the recovery.

The complaint names other courts and bar associations, bar association members, and clients of such members as coconspirators to the extent that they have joined in adopting or enforcing laws and rules

> "... which prohibit clients pursuing antitrust claims and/or their attorneys working on a contingent-fee basis from obtaining the money to pay the litigation expenses by selling a percentage of their respective interests in the antitrust claims to private or public investors and from employing expert witnesses to testify at the trial on a contingent-fee basis;"

Plaintiff as counsel is prosecuting a particular antitrust case which, it is alleged, has become so expensive that the plaintiffs in it cannot bear the expense of bringing it to trial and retaining experts to testify and to prepare necessary accounting, survey, statistical and economic studies. Plaintiff alleges that he

plans to and would, but for the statutes, rules and canons which appear to forbid it, seek investors, by private or public offering, whose investments would finance the pending litigation in exchange for the investors' receiving interests in the claim that in the aggregate would not exceed 50% of the final recovery; it is contemplated that the investors would not acquire any right to control the litigation, render legal advice about it, or engage in the practice of law in connection with the case.

Plaintiff alleges that defendants in such cases as antitrust cases usually can afford to and do retain experts to aid in their defense, that such experts are often drawn from firms of experts who have regularly served the defendants in the past, expect to serve them in the future, and may, therefore, be supposed to be influenced

as expert witnesses by those factors; plaintiff complains that, in contrast, plaintiffs are not free to retain experts whose compensation will be based on the amount of the recovery if there is any; this, plaintiff complains, is a legally enforced disparity in treatment that transgresses constitutional rights.

Hence, plaintiff argues that the Court should declare invalid the laws that, as implemented and applied, impose these radical and discriminatory disparities in rights of access to the courts of justice and in the ability of the less affluent litigants to vindicate their rights of property, and, further, that the court should enjoin their enforcement by defendants.

The parties have argued, in the main, the quality of the constitutional arguments

advanced, plaintiff contending that they are substantial, the defendants that they are too insubstantial to justify convening a court under 28 U.S.C. 2281. It can well be thought that no threat of execution or enforcement is present, and that the case is, rather, one in which plaintiff's plans are frustrated by legal uncertainties that require resolution by ruling, or if need be, by judicial declaration.

While the briefs discuss champerty, maintenance and barratry, the discussion is wide of the mark and assumes rather than illuminates the points in issue. What is principally involved is the application of Judiciary Law § 90(2), vesting the state supreme court with "power and control" over lawyers and the practice of the law and authorizing the appellate divisions to censure, suspend from practice or

disbar lawyers who are guilty of professional misconduct or conduct prejudicial to the administration of justice and of the rules of several appellate divisions that define professional misconduct. The Appellate Division, First Department, defines such misconduct in its Rules § 603.2 as including violation of any Disciplinary Rule of the Code of Professional Responsibility as adopted by the State Bar Association effective January 1, 1970. Section 691.2 of the Second Department Rules is in the same language. Section 1022.17 of the Fourth Department rules similarly incorporates the Code of Professional Responsibility. Plaintiff emphasizes the incorporation from the Code, in this manner, of DR 2-103(D) (a lawyer may not help a person or organization that furnishes legal services to others to promote use of the lawyer's services); DR 2-106(A) (a lawyer may not contract for or

receive excessive fees); DR 2-107(A) (a lawyer may not divide fees with another lawyer unless done so with the client's assent and in proportion to services rendered and responsibility assumed); DR 3-101(A) (a lawyer is not to help a layman practice law); DR 3-102 (a lawyer is not to divide fees with a layman); DR 5-103(B) (a lawyer is not to advance or guarantee financial assistance to a litigant except to the extent of direct litigation expenses, and the client must remain liable for the expenses); DR 5-107(C) (a lawyer may not practice in corporate or association form if nonlawyers own an interest in or are directors or officers of the entity or have the right to direct or control the lawyer's professional judgment); DR 7-109(C) (a lawyer may not pay, or acquiesce in the paying of, compensation to a witness contingent upon the

content of his testimony or the outcome of the case, but may advance, guarantee, or acquiesce in the payment of a reasonable fee for the professional services of an expert witness). DR 5-103 provides that a lawyer shall not acquire a proprietary interest in the cause of action or subject matter of a litigation he is conducting for a client, but may acquire his lien for services under applicable law, and may contract for a reasonable contingent fee.

The disciplinary rules in part lead back to First Department Rules § 603.18 (Champerty and Maintenance) and an identical Second Department rule provision (Section 691.15). These rules in substance forbid (1) the lawyer's giving in his own or in anothers name, before or after suit, a promise of anything of value to anyone to induce the placing of a claim in his hands or in the hands of another for the purpose of suing on it

or defending against it, and forbid (2) the lawyer's paying any expense of prosecuting or defending against the claim as a consideration for such retainer.

The Judiciary Law covers some of the same ground. Sections 479, 481, and 482 make it unlawful for anyone to solicit or procure through solicitation a retainer for an attorney or to make a business of doing so, and make it unlawful for hospital employees, policemen, court personnel, or bailbondsmen to communicate with an attorney to aid or abet him in soliciting legal business or in procuring through solicitation a retainer or other agreement to perform legal services, and make it unlawful for the attorney to employ anyone to solicit, or to aid or abet in soliciting legal business or a retainer. These acts are made misdemeanors by Section 485.

Section 488 is closer to the classic definition of champerty: the section forbids lawyers' buying or taking any interest by assignment in any sort of thing in action "with the intent and for the purpose of bringing an action thereon," and forbids lawyers' promising or giving a valuable consideration to anyone as an inducement to or in consideration for the placing in his hands (or another's) of a claim for the purpose of suing on it. Section 489 enacts that persons and partnerships engaged in the claim adjustment or collection business and corporations generally shall not buy or take any interest by assignment in any thing in action, claim or demand "with the intent and for the purpose of bringing an action ...thereon."

It is not at once apparent that any transgression of statute or rule must occur if plain-

tiff's client transfers interests in the claim in suit as a means of obtaining money to continue the suit to completion. The client has already put the claim in suit and engaged counsel of its own choosing. There is no suggestion that any voice in controlling the litigation would be given to the transferees of interests. Plaintiff alleges (as in paragraphs 14 and 17) that the transfer would embrace a corresponding share in plaintiff's contingent fee, but that, in substance, means only that plaintiff's original clients will pay plaintiff out of their share in the final recovery, and, presumably, that circumstance will enter into the client's calculations of what share of the claim he will sell and at what price.

At this juncture, leaving aside Disciplinary Rule DR 7-109C, there does not appear to be any

threat of action to prevent partial assignments of the rights of action sued on, and there is no basis, simply for that reason, for seeking to enjoin state officers from enforcing statutes and rules of, at best, doubtful applicability and in advance of their infraction. Rather, the case is one in which no threat of interference could easily arise unless plaintiff had sought from the Committee on Ethics of the Bar Association and been denied a favorable opinion on the ethical propriety of his project. If that occurs, then consideration of the issues tendered here will have to be resumed, although it seems questionable that, quite apart from any constitutional issues and the question of the substantiality of any such issues, the threat of enforcement by state officers will be such as to bring the case within Section 2281.

The questions circling around Disciplinary Rule DR 7-109C stand in a different light. To quote it in full - it is subsumed under Canon 7 which provides that "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law" -

> "A lawyer shall not pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
>
> 1. Expenses reasonably incurred by a witness in attending or testifying.
> 2. Reasonable compensation to a witness for his loss of time in attending or testifying.
> 3. A reasonable fee for the professional services of an expert witness."

The language of the rule literally means that the fee arrangement of an expert for his services in a litigation may not be contingent on the outcome of the case no matter how reasonable in amount and how probable the outcome and whether or not counsel in the same case are authorized (under Disciplinary Rule DR 5-103A.2.) to receive a

fee contingent on the outcome of the case. The rule must be related to a risk of false swearing, the fear of which may be enhanced by a recognition that much expert testimony is difficult, often inscrutable and, therefore, especially open to calculated distortion. A fairly old - and difficult - New York case, Wellington v. Kelly, 1881, 84 N.Y. 543, 548-549, dealing with an agreement to compensate a witness for the production of critical testimony, approved contingent payment on the ground that the witness had an interest in the outcome of the case in any event, saying

> "The mere fact that the agreement might furnish a temptation to Hill (the witness) to prevaricate, or furnish false testimony, does not, we think, stamp the agreement as illegal per se, and no illegal or improper intent on the part of any of the parties is disclosed by the evidence."

But generally the New York cases enunciate the

rule of DR 7-109C very clearly. Matter of Schapiro, 1st Dept. 1911, 144 App.Div. 1, 128 N.Y. Supp. 852; Laffin v. Billington, App. Term 1st, 1904, 86 N.Y.Supp. 267. The Restatement of the Law, Contracts, § 552(2) is precisely to the same effect, as are 14 Williston, Contracts (3rd ed. 1972) 879 (§ 1716) and 6A Corbin, Contracts 379 (§ 1430). And the same rule is followed in N.Y.City Bar Assoc. Opinions No. 213 (1932) and 76 (1927-28). Only Barnes v. Boatmen's Nat'l Bank of St. Louis, 1941, 348 Mo. 1032, 156 S.W.2d 597 has been turned up as a case looking the other way. See also the language in Alexander v. Watson, 4th Cir. 1942, 128 F.2d 627, 630; Ferroline Corp. v. General Airline & Film Corp., N.D. Ill. 1952, 107 F.Supp. 326, 344; aff'd., 7th Cir. 1953, 207 F.2d 912, 916. The Barnes Court's holding sufficiently appears from the

following excerpt:

> "Of course, counsel representing the administratrices knew that they must produce evidence to combat the presumption of Hugh Thomasson's sanity; however, there is nothing in the letter requiring respondent to furnish evidence to prove any specified fact. Nor is there anything in the evidence tending to show that respondent's testimony and advice was not his honest opinion. As this point is being ruled on appellant's demurrer to the evidence, we are not at liberty to draw the inference that respondent's testimony was false because his fee was contingent upon the success of the litigation. If we did so, we would be compelled to infer that a party litigant's testimony was false because he is interested in the outcome of his litigation. We would also have to infer that all witnesses were guilty of perjury who were produced by an attorney trying a case on a contingent fee basis.
>
> "We therefore hold that a valid contract does not become invalid as against public policy because the respondent was to be paid for his services only on the contingency that the estate of Hugh Thomasson should be successful in its various litigations then pending."

In this state of the law it would appear unlikely in the extreme that plaintiff could hope

to obtain a favorable ruling form the Committee on Ethics. Yet without a ruling of some sort it is all but certain that he could not obtain an expert on a contingent fee basis, and, even if he could do so, and went forward, he would risk disciplinary proceedings. Plaintiff is, then, so far as concerns DR 7-109C, in the classic declaratory judgment plaintiff's posture (28 U.S.C. 2201; cf. Aetna Life Ins. Co. v. Haworth, 1937, 300 U.S. 227; Willing v. Chicago Auditorium Ass'n, 1927, 277 U.S. 274, 288-289, 291) unless his contentions are so insubstantial that they can be characterized as frivolous. The contention in essence is that the disciplinary rule, whether or not it expresses a tradition in the law of contracts, is irrational and operates in such a manner as to discriminate against those who cannot afford expert testimony, and may tend

to deny to the less affluent litigant (typically but not necessarily a plaintiff) access to the courts in cases which, if fairly and fully tried, might be shown to be meritorious. The pungent comment of the Missouri court could well be thought to answer the claim of frivolity, and it might well be suggested that DR 7-109C ignores the idea that an expert in ordinary expectation would not engage to misrepresent his opinion for a fee measured on the outcome of the case rather than decline to act in a case in which he did not in fact form an opinion favorable to the contention of the party seeking to engage his expertise. It is difficult to understand the basis on which a compensated expert could ever be heard as a witness if the ordinary expectation were that experts generally will distort or misrepresent their opinions for a fee. Contin-

gency of payment might seem on analysis an irrelevancy: reasonableness might appear to be the touchstone for licit contingent fees than for fees payable in all events.

But again it is clear that the case is not one for an injunction within Section 2281, and is not a case for convening a three judge court.

It is, accordingly,

ORDERED that plaintiff's motion to convene a three judge court under 28 U.S.C. 2281 is in all respects denied.

Brooklyn, New York

March 24, 1976. /s/ JOHN F. DOOLING, JR.

U. S. D. J.

APPENDIX B - MEMORANDUM AND ORDER DATED JUNE 25, 1976 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - X

CARL E. PERSON,
Plaintiff, :

-against-

: 75 C 1473
THE ASSOCIATION OF THE BAR : MEMORANDUM
OF THE CITY OF NEW YORK, : and
SUPREME COURT, APPELLATE : ORDER
DIVISION, FIRST DEPARTMENT, :
SUPREME COURT, APPELLATE
DIVISION, SECOND DEPARTMENT, and:
ATTORNEY GENERAL OF NEW YORK
STATE, :
Defendants.
- - - - - - - - - - - - - - - - - - - X

Appearances:

CARL E. PERSON, Esq., plaintiff pro se

HALIBURTON FALES, 2d Esq. (Messrs. WHITE & CASE and ROBERT H. HAILE, Esq., and DIANE S. LINKER, Esq., of Counsel) for the Association

DANIEL M. COHEN, Esq. (LOUIS J. LEFKOWITZ, Esq., Attorney General, of Counsel) for Defendants other than the Bar Association, and for the Attorney General under Executive Law, § 71.

DOOLING, D.J.

Plaintiff has now moved for summary

declaratory judgment invalidating Disciplinary

APPENDIX B - MEMORANDUM AND ORDER DATED JUNE 25, 1976 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Rule 7-109(c) forbidding lawyers' paying or acquiescing in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. Plaintiff asks further, if that relief is granted, for a severance of the part of the case dealing with the Disciplinary Rule (to be denominated 75 C 1473 A), dispensing with the need for an answer to the severed case, and granting other relief as appropriate. Plaintiff's motion, in substance, relies on what was said in the earlier Memorandum and Order (March 24-25, 1976) at pages 10-15.

The defendant Association argues that there is not a constitutionally sufficient controversy to authorize federal judicial intervention since it is not plainly shown that an expert would be available if the Rule were inoperative, or,

indeed, that in the Nabcor case expert testimony is necessary or expected to be used or useful. Further, the defendant Association argues that on issues of principle courts must be slow to issue declaratory judgment, particularly where, as it contends is the case here, no evidentiary demonstration of irrational or discriminatory operation of the Rule has been made.

The posture of a case as this is, inevitably, unusual. The rule, unless ignored, must of itself foreclose a lawyer's effort to obtain expert testimony and go so far to deny to the lawyer the opportunity to demonstrate the availability of such testimony and its specific place in particular cases. But plaintiff has shown without contradiction that in his prosecution of the Nabcor case he is disadvantaged in being unable to retain needed accounting and economic

testimony because of his client's lack of funds and the inhibition of the Rule. The plaintiff has shown, without contradiction, that in his type of practice the predicament is recurrent from case to case. It is the plaintiff who is the one directly restricted by the Rule and rendered less effective than, in his reasonable judgment, he would be if able to seek out expert testimony uninhibited by the constraint of the Rule so far as it outlaws compensation contingent upon the outcome of the case. However, although the constraint directly affects plaintiff, individually, in his practice of his profession the consequence is no less directly experienced by the grievant of limited or nil means who appeals for judicial relief and cannot obtain it in the measure in which it is available to those who can afford to retain experts in the kinds of

of cases in which expert testimony is either essential or necessary to the best and most effective presentation of the litigant's case.

The interests involved are, first, the interest of plaintiff and every other lawyer in being able freely to seek out and, on his clients' behalf, contract on a contingent fee basis with qualified experts where that is the only way in which the client can afford to engage the expert's services or the way which is otherwise appropriate, and, second, the client litigant's interest in having genuine access to the courts. The first interest is derivative from the second, but while the disciplinary rule, of necessity, directly affects the lawyer, it affects the client's underlying interest more drastically. In comforting theory the lawyer can turn his back on such clients and

seek other work. But the client has no alternative to seeking justice except the courts established to dispense it.

The case, then, falls in the area considered in Boddie v. Connecticut, 1971, 401 U.S. 371; Lindsey v. Normet, 1972, 405 U.S. 56, 77-79, and United States v. Kras, 1973, 409 U.S. 434, but raises other considerations as well. Kras should, perhaps, be put aside at once: it rested on the announced constitutional permissibility of denying to the indigent the benefits of the bankruptcy law available to those whose need of those benefits was a little less exigent - on the assumption that alternatives to bankruptcy appeared to be available. (As to Kras, See The Supreme Court, 1972 Term, 1973, 87 Harv. L.Rev. 1, 57-67).

The Rule in its present form authorizes

lawyers to advance, guarantee, or acquiesce in the payment of a reasonable fee for the professional services of an expert. The Rule further forbids the lawyer to offer to pay, or acquiesce in the payment of compensation to a witness "contingent upon the content of his testimony." So much seems plain; at least no ground of criticism of it appears. The difficulty is with the rule so far as it forbids payment "contingent upon...the outcome of the case." The Rule necessarily means that even if the fee agreed upon is reasonable and is not linked to the content of the testimony, the fee arrangement is improper.

It must be doubted that there is total compliance with the Rule in its present form. The case in which the unsuccessful personal injury plaintiff's lawyer goes unpaid must not infrequently be also the case in which the expert medical witness does not press either the

plaintiff or his lawyer for payment. Apart from that, however, litigation today calls for the use of many kinds of experts in many kinds of cases. The most obvious are the personal injury cases requiring medical testimony, malpractice cases against practitioners in various professional fields, product liability cases involving questions of design, malfunction and defect, patent and copyright cases, desegregation cases, obscenity control cases and other kinds of cases in addition to anti-trust cases. Disparity in means between litigants is not always present, nor is total inability to pay a needed expert the common situation. But disparity and need are frequent, and, although contingent fee arrangements, if licit in principle, would not be available only to the indigent, it is inherent in the Rule that it must particularly

forbid to the less affluent and to the indigent a means of obtaining an equal hearing to that accorded to a more affluent adversary in the same case. In the case where one party is of limited means the "discrimination" in treatment is individual, pointed and specific as well as general in its tendency to handicap the less affluent and the indigent classes of litigants in their efforts to vindicate their rights. Yet a litigant, although without means, can obtain any lawyer whom the merits of his claim will attract to his case. But he may not obtain any expert whom the merits of his case can attract to study it and testify to his opinion.

The purpose of the prohibition, to remove an incentive to untruthful testimony, is not likely to be achieved by the Rule, and, to the extent achieved, would be gained at too great a loss in fundamental fairness. An incentive to

untruthful testimony is implicit in any payment to a witness "for" his testimony. The Rule recognizes the risk in requiring that payments to expert witnesses be reasonable in amount. That, it must be inferred, means an amount related to time spent, difficulty of the problem, inconvenience imposed because of the nature of judicial proceedings, and such factors, but must never be such an amount that the inference is that the expert has been paid to give testimony of a certain content and not simply an appropriate fee for his time, effort and court attendance. But the Rule makes an unreasoned transition in outlawing the retainer of an expert on a contingent basis no matter how reasonable his fee would be if success attended his client and he was paid his agreed fee. No basis in reason exists for rejecting a reasonable fee arrange-

ment simply because the fee is not to be paid if the client does not prevail in the case. And there is no fair ground for excluding from the determination of reasonableness a consideration of the circumstance that the fee is contingent and not payable in all events. It is not meant to suggest that in the case of the expert a fee measured as a percentage of the recovery might not generally or in particular cases be regarded as per se unreasonable. But it is concluded that to treat contingency of payment as in and of itself improper is too irrational to survive Fourteenth Amendment analysis. The interest in access to the courts on a basis of equality may not exact redress of every imbalance that disparity of means can produce, but it is of such fundamental importance that it cannot be subjected to a constraint that is not adapted

to effective achievement of its professed goal and which exacts a sacrifice which must, in any case, be disproportionate to the merely conjectured probability of occurrence of the wrong aimed at. Cf. Boddie v. Connecticut, supra, 401 U.S. at 377, 379-380; Winters v. Miller, 2d Cir. 1971, 446 F.2d 65, 71.

It follows that plaintiff's motion for leave to amend and for a summary declaratory judgment that Disciplinary Rule DR 7-109C, and that rule as incorporated in Rule 603.2 of the Rules of the Appellate Division, First Department, and Rule 691.2 of the Rules of the Appellate Division, Second Department, so far as the rule proscribes the payment of reasonable fees for the professional services of expert witnesses if payment of the fees is contingent upon the outcome of the case is invalid, must

APPENDIX B - MEMORANDUM AND ORDER DATED JUNE 25, 1976 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

be and it is granted. Since the issue is plainly involved with the remaining anti-trust issues, however, it would not be appropriate to sever the issue or enter a separate judgment on the issue before the entry of final judgment in the case.

Brooklyn, New York

June 25, 1976. /s/ JOHN F. DOOLING, JR.

U. S. D. J.

APPENDIX C - MEMORANDUM AND ORDER DATED AUGUST 10, 1976 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

CARL E. PERSON,

Plaintiff, :

- against - : 75 C 1473

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK; SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT; SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT; and ATTORNEY GENERAL OF NEW YORK STATE, : MEMORANDUM and ORDER

Defendants.

- X

Plaintiff has moved for an order dismissing counts one and two of his amended complaint without prejudice and entering final judgment in accordance with this Court's Memorandum and Order of June 25, 1976. The defendants contest the need for a declaratory judgment under 28 USC 2201. However, the Memorandum and Order of June 25, 1976, state fully the reasons for such a judgment. Defendants also assert that dismissal of counts one and two should be with prejudice.

APPENDIX C - MEMORANDUM AND ORDER DATED AUGUST 10, 1976 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

But, as plaintiff points out, no discovery has been sought or obtained on these claims, and there have been no proceedings of substance on those claims; therefore, no real reason appears to deny plaintiff's request for dismissal without prejudice of his causes of action against the defendants. Accordingly, it is,

ORDERED that counts one and two of plaintiff's amended complaint are dismissed without prejudice under F.R.C.P. 41(a)(2), and it is further,

ORDERED that the Clerk prepare a final judgment for the approval of the Court, that,

1) it is adjudged that Disciplinary Rule 7-109C of the Lawyers' Code of Professional Responsibility as adopted by the New York State Bar Association, and that rule as incorporated in Rule 603.2 of the Rules of the Appellate

APPENDIX C - MEMORANDUM AND ORDER DATED AUGUST 10, 1976 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Division, First Department, and Rule 691.2 of the Rules of the Appellate Division, Second Department, so far as the rule proscribes the payment of reasonable fees for the professional services of expert witnesses if payment of the fees is contingent upon the outcome of the case, is unconstitutional; and that

2) plaintiff take nothing on counts one and two, and that those counts are dismissed against all defendants, with costs as taxed by the Clerk.

Brooklyn, New York,

August 10, 1976.

/s/ JOHN F. DOOLING, JR.
U. S. D. J.

APPENDIX D - JUDGMENT DATED AND ENTERED AUGUST 12, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

CARL E. PERSON,

Plaintiff,

- against -

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK; SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT; SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT; and ATTORNEY GENERAL OF NEW YORK STATE,

Defendants.

----------x

JUDGMENT

75-C-1473

A memorandum and order of Honorable John F. Dooling, United States District Judge, having been filed on August 11, 1976, dismissing counts one and two of plaintiff's amended complaint without prejudice pursuant to F.R.C.P. 41(a)(2) and directing the Clerk to enter judgment that

1) Disciplinary Rule 7-109C of the Lawyers' Code of Professional Responsibility, as adopted

APPENDIX D - JUDGMENT DATED AND ENTERED AUGUST 12, 1976

by the New York State Bar Association, and that rule as incorporated in Rule 603.2 of the Rules of the Appellate Division, First Department, and Rule 691.2 of the Rules of the Appellate Division, Second Department, so far as the rule proscribes the payment of reasonable fees for the professional services of expert witnesses if payment of the fees is contingent upon the outcome of the case, is unconstitutional; and that

2) plaintiff take nothing on counts one and two, and that those counts are dismissed against all defendants, with costs as taxed by the Clerk, it is

ORDERED and ADJUDGED that

1) Disciplinary Rule 7-109C of the Lawyers Code of Professional Responsibility, as adopted by the New York State Bar Association, and that rule as incorporated in Rule 603.2 of the Rules of the Appellate Division, First Department, and

APPENDIX D - JUDGMENT DATED AND ENTERED AUGUST 12, 1976

Rule 691.2 of the Rules of the Appellate Division, Second Department, so far as the rule proscribes the payment of reasonable fees for the professional services of expert witnesses if payment of the fees is contingent upon the outcome of the case, is unconstitutional; and that

2) plaintiff take nothing on counts one and two, and that those counts are dismissed against all defendants with costs as taxed by the Clerk.

Dated: Brooklyn, New York
August 12, 1976

/s/ LEWIS ORGEL
Clerk

By: /s/ THOMAS BLASTELLO
Chief Deputy Clerk

Approved: August 12, 1976

/s/ JOHN F. DOOLING, JR.
U.S.D.J.

APPENDIX E - OPINION OF CIRCUIT JUDGE SMITH OF THE SECOND CIRCUIT, DATED APRIL 29, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 590 - September Term, 1976

(Argued March 8, 1977 Decided April 29, 1977.)

Docket No. 76-7457

CARL E. PERSON
Plaintiff-Appellee,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,
Defendants-Appellants.

Before: KAUFMAN, Chief Judge, SMITH and MULLIGAN, Circuit Judges.

Appeal from a summary declaratory judgment in the United States District Court for the Eastern District of New York, John F. Dooling, Jr., Judge, declaring unconstitutional Disciplinary Rule 7-109C of the Lawyers' Code of

APPENDIX E - OPINION OF CIRCUIT JUDGE SMITH OF THE SECOND CIRCUIT, DATED APRIL 29, 1977

Professional Responsibility as incorporated in the Rules of the Appellate Division of the First Department and the Second Department of the Supreme Court of New York. Reversed.

DANIEL M. COHEN, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, of counsel), for Appellants.

CARL E. PERSON, New York, N.Y., Appellee Pro Se.

SMITH, Circuit Judge:

The Supreme Court, Appellate Division, First Department, Supreme Court, Appellate Division, Second Department, and the Attorney General of the State of New York, defendants below, appeal from a summary declaratory judgment in the United States District Court for the Eastern District of New York, John F. Dooling, Jr., Judge, which declared unconstitutional Disciplinary Rule 7-109C of the Lawyers' Code of Professional

APPENDIX E - OPINION OF CIRCUIT JUDGE SMITH OF THE SECOND CIRCUIT, DATED APRIL 29, 1977

Responsibility ("DR 7-109C"). This rule has been adopted by the New York State Bar Association and incorporated in Rule 603.2 of the Rules of the Appellate Division, First Department, and Rule 691.2 of the Rules of the Appellate Division, Second Department.[1] The rule was declared unconstitutional insofar as it proscribes the payment by attorneys of reasonable fees for the professional services of expert witnesses if payment of the fees is contingent upon the outcome of the case.[2] We reverse.

The sole issue on appeal is the constitutionality of DR 7-109C, Person having abandoned all claims except those specifically ruled upon by the court below.[3]

New York Judiciary Law § 90(2) vests the state supreme court with "power and control" over lawyers and the practice of the law and authorizes the appellate divisions to censure, suspend from

practice, or to disbar lawyers who are guilty of professional misconduct or conduct prejudicial to the administration of justice. Such misconduct is defined by § 603.2 of the Rules of the First Department and § 691.2 of the Rules of the Second Department to include violations of any disciplinary rule of the Code of Professional Responsibility as adopted by the State Bar Association, including DR 7-109C.

Plaintiff-appellee, Carl E. Person, is the attorney for ten plaintiffs in an antitrust action in the Southern District of New York, National Auto Brokers Corp. v. General Motors Corp. (70 Civ. 5421), the "Nabcor action," in which plaintiffs are seeking $300,000,000 in damages.[4/] Person alleges, inter alia, that he is unable to prosecute the Nabcor action because neither National Auto Brokers Corp. nor any of the other plaintiffs in the suit, can afford

adequate expert testimony in the fields of accounting, franchising, financing and economics, unless he is permitted to retain experts on a contingent fee basis, a practice not permitted under DR 7-109C. His specific allegations have been set out by the court below. Person v. Association of the Bar of the City of New York, 414 F. Supp. 139, 140 (E.D.N.Y. 1976).

The district court granted summary judgment because it found that DR 7-109C foreclosed a lawyer's effort to obtain expert testimony. The court agreed that in the Nabcor action, Person had demonstrated that he was unable to obtain needed accounting and economic testimony because of his clients' lack of funds and the inhibition of the disciplinary rule, and that he was therefore rendered less effective than, in his judgment, he would have been if he were able to seek out expert testimony on a contingent fee

basis. In addition to a litigant's interest in having genuine access to the court, the attorney, the court held, had an interest in being able freely to seek out and contract on a contingent fee basis with qualified experts where that is the only or most appropriate way in which a client can afford to retain expert services. It found that no basis in reason exists for rejecting a reasonable fee arrangement simply because the fee will not be paid if the client does not prevail in the case. Person v. Association of the Bar, 414 F. Supp. 144 (E.D.N.Y. 1976). The court held that

> to treat contingency of payment as in and of itself improper is too irrational to survive Fourteenth Amendment analysis. The interest in access to the courts on the basis of equality may not exact redress of every imbalance that disparity of means can produce, but it is of such fundamental importance that it cannot be subjected to a contraint that is not adapted to effective achievement of its professed goal and which exacts a sacrifice which must, in any

> case, be disproportionate to the merely conjectured probability of occurrence of the wrong aimed at. (414 F. Supp. at 146).

The court cited Boddie v. Connecticut, 401 U.S. 371, 377, 379-380 (1971), and Winters v. Miller, 446 F.2d 65, 71 (2d Cir.), cert. denied, 404 U.S. 985 (1971), in support of its holding, and entered summary judgment declaring Disciplinary Rule 7-109C unconstitutional.[5/]

I.

Jurisdiction below is based on 28 U.S.C. § 1343(3), 42 U.S.C. § 1983, and on 28 U.S.C. § 2201. Before proceeding to the merits, we first address appellants' claims that the court lacks subject matter jurisdiction because no case or controversy exists, and that the Appellate Division defendants are not "persons" within the meaning of the Civil Rights Act.

The disciplinary rule at issue has been

incorporated into the laws of the State of New York. Payment by an attorney of contingent fees for expert testimony, offers to pay, or acquiescence in the payment of contingent fees, are all forbidden under DR 7-109C. The district court concluded that "(t)he Rule, unless ignored, must of itself foreclose a lawyer's effort to obtain expert testimony and go far to deny to the lawyer the opportunity to demonstrate the availability of such testimony. . . ." 414 F. Supp. at 145. The underlying action is still pending and the present claim may well determine the plaintiff's ability to pursue it. Since there is no reason to assume that the rule will not be enforced, we find a substantial controversy of sufficient immediacy to warrant the issuance of a declaratory judgment.[6/] Golden v. Zwickler, 394 U.S. 103, 108 (1969).

State disciplinary and disbarment pro-

ceedings have been held comparable to criminal proceedings. In re Ruffalo, 390 U.S. 544, 551 (1968). Because the threat of disciplinary action is real but state proceedings have not yet been instituted which would prevent federal review under Younger v. Harris, 401 U.S. 37 (1971), and Anonymous v. Association of the Bar of the City of New York, 515 F.2d 427, 430 (2d Cir.), cert. denied, 423 U.S. 863 (1975), this is an appropriate time for a declaratory judgment. Doran v. Salem Inn, Inc., 422 U.S. 922, 930-31 (1975).

We hold further that this suit for declaratory relief is maintainable against defendants-appellants under 42 U.S.C. § 1983. Although a judge exercising his judicial function is not liable for damages under 42 U.S.C. § 1983, Pierson v. Ray, 386 U.S. 547, 553-55 (1967), the immunity of judges has been held in a number of

cases not to extend to actions for injunctive relief. Littleton v. Berbling, 468 F.2d 389, 406-07 (7th Cir. 1972), rev'd on other grounds sub nom. O'Shea v. Littleton, 414 U.S. 488 (1974); Erdmann v. Stevens, 458 F.2d 1205, 1210 (2d Cir.), cert. denied, 409 U.S. 889 (1972); Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F. Supp. 117, 123 (S.D.N.Y. 1969) (three-judge court), aff'd on other grounds, 401 U.S. 154 (1971).[7/]

II.

The district court held that an attorney has a right to retain experts on a contingent fee basis whenever this is appropriate for the most effective prosecution of a civil action. It held further that an attorney's clients have a fundamental right of access to the courts, citing Boddie and Winters, and found that appellee's

clients were deprived of this right of access through the operation of DR 7-109C. The rule, the court held, had no rational justification and was therefore unconstitutional under the fourteenth amendment.

We find the court's reliance on Boddie and Winters misplaced. The fundamental nature of the marriage relationship and the exclusiveness of the courts as a means for dissolving that relationship were central to the Court's decision in Boddie. Justice Harlan, writing for the Court, pointed out that the Court went "no further than necessary to dispose of the case before us" and did not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the due process clause of the fourteenth amendment. 401 U.S. at 382-83. The Supreme Court has upheld a filing fee for indigents seeking a

discharge in bankruptcy. United States v. Kras, 409 U.S. 434 (1973). It held that since bankruptcy was a legislatively created benefit, no constitutional right of access to bankruptcy proceedings existed. In contrast to the fundamental rights at stake in Boddie, bankruptcy involves economic rights which the court held were not fundamental. The Court also based its decision in Kras on the availability of alternate means for the adjustment of legal relations with creditors. Since it found no fundamental interest at stake in bankruptcy, it held that the proper standard for reviewing applicable legislation was the existence of a "rational justification." 401 U.S. 444-47.

Winters v. Miller, supra, was decided two years before Kras. Winters upheld the right of access to a court by a plaintiff seeking damages for the infringement of rights guaranteed under

the first amendment.

Here we have no denial of access—plaintiffs are in court and have already engaged in extensive litigation. Their claim is that the rules place an insuperable obstacle in the way of successful presentation of their position on trial. It may be conceded that litigation of difficult and complex matters by persons with small individual stakes in the outcome may be aided and encouraged by elimination of the prohibition against the hiring of experts whose fees may be contingent upon the results. We are not convinced, however, that there is no danger of the inducement of false expert testimony by such contingency arrangements.

The legislature has made a judgment that the need for discouragement of contingent fee arrangements outweighs the obstacle to financing litigation which a ban on contingent fees may

create. We cannot say that this legislative judgment is irrational. The extent of the obstacle and the weight to be given its existence when balanced against the likelihood of false testimony and unfair results from permitting the procurement of expert testimony by the offer of a stake in the outcome are matters of judgment best confided to legislative and judicial bodies of the state.

We think that the interest in treble damage antitrust claims of persons with little at stake individually is more closely akin to the legislatively created interest in the shedding of debt obligations through bankruptcy of Kras than to the fundamental interest of an individual in the marriage relationship which was before the Court in Boddie.

The New York rule is not analogous to a Virginia statute regulating the solicitation of

legal business which the Supreme Court struck down in NAACP v. Button, 371 U.S. 415 (1963), cited by appellee. In contrast to the Virginia statute invalidated in NAACP v. Button, the New York disciplinary rule is specific, not subject to selective enforcement because of vagueness, and its effect on first amendment rights, if any, is remote. DR 7-109C does not deny attorneys or their clients access to the courts — it merely forces attorneys and litigants to finance the payment of experts in a manner not related to the outcome of the litigation. Courts have for centuries possessed disciplinary powers incident to the administration of justice. NAACP v. Button, supra, 371 U.S. at 456 (Justice Harlan dissenting). DR 7-109C is a proper exercise of such a power.

We also reject appellee's argument that the incidental economic burden placed on some

litigants by DR 7-109C constitutes a violation of the equal protection clause of the fourteenth amendment. Strict scrutiny of a legislative classification is required for equal protection determination only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); San Antonio School District v. Rodriguez, 411 U.S. 1, 17 (1973). Classifications in the area of economics and social welfare have been held not to constitute such suspect classifications. Ortwein v. Schwab, 410 U.S. 656, 659 (1973); Dandridge v. Williams, 397 U.S. 471, 485-86 (1970). In the absence of interference with a fundamental right of access or a suspect classification, the relevant standard of review is the rationality of the New York rule.

Massachusetts Board of Retirement v. Murgia, supra, 427 U.S. at 312; McGowan v. Maryland, 366 U.S. 420, 425 (1961).

States have a compelling interest in regulating the conduct of professionals who practice within their borders. The interest in regulating lawyers is especially great because lawyers are essential for the functioning of the administration of justice. Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). In New York the legislature has expressly provided that the judiciary has the power to regulate attorneys, People ex rel. Karlin v. Culkin, 248 N.Y. 465, 472-77 (1928); Judiciary Law § 90(2). Disciplinary Rule 7-109C was promulgated to insure that judicial proceedings in New York were free of false testimony which might result if expert witnesses were paid on a contingent fee basis. Expert testimony, by its very nature, concerns

areas of knowledge with which the ordinary juror and the court are unfamiliar, and perjured expert testimony is particularly difficult for a juror to detect. New York has adopted DR 7-109C to lessen the likelihood of false expert testimony. The rule is not invalid because it cannot prevent all perjured expert testimony. New York may tackle a problem one step at a time. Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). "(A court's) procedure does not run afoul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser. . . ." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

Person has advanced arguments why it might be desirable to alter the present rule in order to facilitate litigation by less affluent litigants. He points out that cross-examination would reveal whatever financial stake a witness

has in the outcome of litigation. He notes that experts often have ongoing business relationships with the parties who retain them and therefore, in an indirect sense, frequently have a stake in the outcome of litigation although their fee is not contingent and thus not covered by DR 7-109C. Other experts, although retained on a "fixed fee" basis, often do not expect to receive payment unless the party for whom they testify is successful. These are factors which may indicate the desirability of legislative change, but they do not constitute sufficient grounds for invalidating the current canon or rule.[8/]

New York Disciplinary Rule 7-109C does not affect a fundamental right nor create a suspect classification. We hold that it has a sufficient rational basis to withstand a constitutional challenge under the equal protection and due process clauses of the fourteenth amendment.[9/]

APPENDIX E - OPINION OF CIRCUIT JUDGE SMITH OF THE SECOND CIRCUIT, DATED APRIL 29, 1977

The judgment is reversed and the complaint dismissed.

Footnotes

1/ Disciplinary Rule 7-109C states:

> A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
>
> 1. Expenses reasonably incurred by a witness in attending or testifying.
> 2. Reasonable compensation to a witness for his loss of time in attending or testifying.
> 3. A reasonable fee for the professional services of an expert witness.

APPENDIX E - OPINION OF CIRCUIT JUDGE SMITH OF THE SECOND CIRCUIT, DATED APRIL 29, 1977

2/ The Code of Professional Responsibility was adopted by the American Bar Association on August 12, 1969 and became effective January 1, 1970. McKinney's Consol. Laws of N.Y., Book 29, Judiciary Law, Appendix at 351, 499. The Association of the Bar of the City of New York, a defendant below, has not taken a separate appeal. It views itself as an investigative and prosecutorial agency of the First Department. (First Department Rules, § 603.4). Appellants' Brief at 2.

3/ Person moved to convene a three-judge district court below to declare unconstitutional those sections of the New York Judiciary Law which forbid the transfer for value of shares in rights in action and the retention of expert witnesses whose fee is contingent on the outcome of the suit. This

motion was denied below. Person v. Association of the Bar of the City of New York, 414 F. Supp. 139 (E.D.N.Y. 1976). Person then moved for a summary declaratory judgment solely on the issue of the validity of DR 7-109C.

4/ See published opinions in Nabcor action: 332 F. Supp. 280 (S.D.N.Y. 1971); 60 F.R.D. 476 (1973); 376 F. Supp. 620 (S.D.N.Y. 1974).

5/ Person has moved pursuant to Fed. R. Civ. P. 41(a)(2) to dismiss all claims not adjudicated by grant of the summary judgment. The court granted his motion and entered summary judgment declaring DR 7-109C unconstitutional on August 12, 1976 in accord with its Memorandum and Order of June 25, 1976. Joint Appendix 177-79.

6/ Appellants argue that "DR 7-109C does not and did not prevent plaintiff from arranging with an expert to testify on a contingent fee basis provided DR 7-109C was declared unconstitutional." Appellants' Brief at 8. This argument is circular and without merit. It is the constitutionality of the rule which is at issue in this case.

7/ In Wadmond, the Supreme Court of New York and two of its Appellate Divisions were named as defendants and were held to be suable for injunctive relief. (Opinion by Judge Friendly.)

8/ See Recent Developments in Attorneys' Fees, 29 Vand. L.R. 685, 710-16 (1976); F. Michelman, Litigation Access Fees, 1973 Duke L.J. 1153, 1160.

APPENDIX E - OPINION OF CIRCUIT JUDGE SMITH OF THE SECOND CIRCUIT, DATED APRIL 29, 1977

9/ We do not reach any question which might be raised were the state rules arguably in conflict with the federal rules.

APPENDIX F - ORDER OF SECOND CIRCUIT DATED JUNE 14, 1977, DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

.....

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of June, one thousand nine hundred and seventy-seven.

Present: HON. IRVING R. KAUFMAN,
Chief Judge.

HON. J. JOSEPH SMITH,

HON. WILLIAM H. MULLIGAN,

Circuit Judges.

Carl E. Person,
Plaintiff-Appellee,

v.

The Association of the Bar of the City of New York, Supreme Court, Appellate Division, First Department, Supreme Court, Appellate Division, Second Department, and Attorney General of New York State,

Defendants-Appellants.

76-7457

APPENDIX F - ORDER OF SECOND CIRCUIT DATED JUNE 14, 1977, DENYING PETITION FOR REHEARING

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ A DANIEL FUSARO

A. DANIEL FUSARO
Clerk

APPENDIX G - ORDER OF SECOND CIRCUIT DATED JUNE 14, 1977, DENYING PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of June, one thousand nine hundred and seventy-seven.

Carl E. Person,

Plaintiff-Appellee,

v.

The Association of the Bar of the City of New York, Supreme Court, Appellate Division, First Department, Supreme Court, Appellate Division, Second Department, and Attorney General of New York State, 76-7457

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellee, and no active judge or judge who was

APPENDIX G - ORDER OF SECOND CIRCUIT DATED JUNE 14, 1977, DENYING PETITION FOR REHEARING EN BANC

a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN

IRVING R. KAUFMAN, Chief Judge

Supreme Court, U. S.
FILED
OCT 8 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-389

CARL E. PERSON,

Petitioner,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-389

CARL E. PERSON,

Petitioner,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

This brief is filed by defendants-respondents Supreme Court of the State of New York, Appellate Division, First Department, Supreme Court of the State of New York, Appellate Division, Second Department, and the Attorney General of New York State, in opposition to plaintiff-petitioner Carl E. Person's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, dated September 12, 1977.

The Association of the Bar of the City of New York, the remaining defendant, did not take an appeal to the Court of Appeals because it is merely an investigative and prosecutorial agency of one of the defendants, the Supreme

Court of the State of New York, Appellate Division, First Department (60a; First Department Rules, § 603.4).

Petitioner, an attorney *pro se*, seeks review of a unanimous decision of a panel of the United States Court of Appeals for the Second Circuit composed of Chief Judge Irving Kaufman, Judge J. Joseph Smith and Judge William H. Mulligan, which reversed the decision of the United States District Court for the Eastern District of New York (Judge John F. Dooling; 37a-63a).

The District Court had declared Disciplinary Rule 7-109C of The Lawyer's Code of Professional Responsibility, as adopted by the New York State Bar Association ("DR 7-109C"), and that Rule as incorporated in Rule 603.2 of the Rules of the Appellate Division, First Department, and Rule 691.2 of the Appellate Division, Second Department, unconstitutional insofar as the Rule proscribes the payment of reasonable fees for the professional services of expert witnesses *if payment of the fees is contingent upon the outcome of the case* (21a-33a).

It should be noted that neither the American Bar Association, which promulgated The Lawyer's Code of Professional Responsibility (60a), nor the New York State Bar Association, which adopted it to govern Attorneys' conduct in New York (42a), was made a party to this litigation. Their Rule had been declared unconstitutional by the District Court in their absence. The American Bar Association adopted the Code of Professional Responsibility on August 12, 1969, effective January 1, 1970. Martindate-Hubbell Law Directory, Vol. VI, Preface, p. ii to Part VIII, IC. The New York State Bar Association adopted the Code, effective January 1, 1970. McKinney's Consolidated Laws of New York, Book 29, Judiciary Law, Appendix, pocket part, p. 100.

Questions Presented

1. Was the District Court without subject matter jurisdiction because of the lack of a case or controversy?

2. Is Disciplinary Rule 7-109C a reasonable and rational regulation which neither denies petitioner Person access to the courts, nor violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment or the First Amendment?

Statement of the Case

(1)

In his Amended Complaint (which plaintiff has not included in his Appendix), plaintiff, an attorney appearing *pro se*, sought to strike down, as unconstitutional and in violation of the antitrust laws, those provisions of the Judiciary Law of New York, Rules of the four Appellate Divisions of the New York Supreme Court and Disciplinary Rules of The Lawyer's Code of Professional Responsibility, as adopted by the New York Bar State Association, which prohibited plaintiff and his clients from selling antitrust lawsuits based upon those claims, and from paying expert witnesses on a contingent fee basis. More particularly, plaintiff claimed, *inter alia*, that the prohibitions against champerty, maintenance, barratry, splitting fees with a layman, unauthorized practice of law, and paying contingent fees to expert witnesses violated his First and Fourteenth Amendment rights, posed a threat to the republican form of government, and were a burden on interstate commerce (3a, *et seq.*).

Plaintiff moved for the convening of a three-judge court claiming that his complaint presented substantial constitutional issues. Defendants opposed the motion on the grounds that substantial constitutional issues were not pre-

sented and that plaintiff was merely seeking an advisory opinion and should properly have presented the matter to the Ethics Committee of the Association of the Bar of the City of New York. By Memorandum and Order dated March 24, 1976, the District Court denied plaintiff's motion for a three-judge court, but expressed the view that with respect to DR 7-109C plaintiff was "in the classic declaratory judgment plaintiff's posture" (1a-20a).

Plaintiff then moved for a summary declaratory judgment invalidating DR 7-109C. This motion was granted by the District Court, in Memorandum and Order dated June 25, 1976, although it declined to direct that judgment be entered (21a-33a). Thereafter, plaintiff moved for dismissal without prejudice of Counts One and Two of his Amended Complaint* and for an order directing that final judgment be entered declaring DR 7-109C (and that Rule as incorporated in the Rules of the Appellate Divisions of the First and Second Departments) unconstitutional to the extent that it proscribes the payment of reasonable fees for the services of an expert witness if payment of the fees is contingent upon the outcome of the case. By Memorandum and Order dated August 10, 1976, the court granted this motion (34a-36a).

Respondents herein appealed to the United States Court of Appeals for the Second Circuit and in an opinion dated April 29, 1977 (App. E) that court reversed the judgment of the District Court. Mr. Person then filed a petition for a rehearing with a suggestion that the action be reheard *en banc* which was denied by orders of the court dated June 19, 1977 (App. F and G).

The "facts" presented in the Petition are in dispute, contrary to petitioner's assertions (Pet. 33). Because of the procedural posture of the case (primarily the pendency of

* Thus he abandoned all issues except that relating to the validity of the restriction upon contingent expert fees.

petitioner's motion for a three-judge court), no discovery was sought by respondents. However, in the affidavit and brief of the Association of the Bar of the City of New York in opposition to petitioner's motion for summary judgment and during oral argument, it was contended that petitioner's affidavits were conclusory in nature and that it was necessary to obtain the underlying facts in order for the District Court to properly determine the motion. Moreover, it was contended that the District Court should not decide the motion based solely on petitioner's affidavits without affording respondents the opportunity to test the statements made in the affidavits, especially since the issue involved was the constitutionality of a State rule.

(2)

Plaintiff's challenge to DR 7-109C is founded on the following allegations in his Amended Complaint. Plaintiff alleged that he is the attorney for ten plaintiffs ("Nabcor Plaintiffs") in an antitrust action in the Southern District of New York, *National Auto Brokers Corp.* v. *General Motors Corp.* (70 Civ. 5421), the "Nabcor Action". See published opinions in the Nabcor Action in 332 F.Supp. 280 (1971); 60 F.R.D. 476 (1973); and 376 F.Supp. 620 (1974).

In the Nabcor Action which, at the time of the District Court's decision, was being tried before District Judge Griesa (*see, e.g.*, 176 N.Y.L.J. No. 91, p. 19, Nov. 10, 1976), Nabcor Plaintiffs sought damages which they alleged were sustained by them as a result of conspiratorial activities by General Motors Corporation, General Motors Acceptance Corporation, Ford Motor Company, Chrysler Corporation, American Motors Corporation, First National City Bank and various other defendants, which drove Nabcor Plaintiffs out of business. Nabcor Plaintiffs sought in the aggregate $300,000,000 in damages after trebling.

Plaintiff further alleged that neither the National Auto Brokers Corporation ("Nabcor"), nor any of the other

Nabcor Plaintiffs,* had the ability to pay the expenses of litigating the Nabcor Action and that this had resulted in a substantial reduction in plaintiff's and Nabcor Plaintiffs' ability to prosecute the action and to obtain a speedy and just resolution of the issues. Plaintiff further alleged that because of their poor financial condition the Nabcor Plaintiffs were unable to obtain adequate expert testimony in the fields of accounting, franchising, finances and economics unless the experts were paid on a contingent fee basis which DR 7-109C prevents. Petitioner now states that the "trial in the Nabcor Action was held during October, November and early December, 1976, and the action was dismissed, at the end of plaintiffs' case, for alleged insufficiencies of evidence." (Pet. 6)

ARGUMENT

I

There Is No Case Or Controversy Because Plaintiff Did Not Have An Expert Ready, Willing And Able To Assist In The Prosecution Of The Nabcor Action On A Contingent Fee Basis.

Plaintiff presented the court with a purely hypothetical set of facts. In his original Statement Pursuant to Local Rule 9(g) of the Eastern District of New York, plaintiff did not allege that he and the Nabcor Plaintiffs had an expert ready, willing and able to assist in the prosecution of the Nabcor Action for a contingent fee. In fact, it was evident that plaintiff had not even located an expert, and was merely speculating that "[s]ome arrangements by

* It is not clear from the record how many of the Nabcor Plaintiffs are corporations. However, it appears from a reported decision in the Nabcor Action that at least three are corporations and one is a partnership. *National Auto Brokers Corp.* v. *General Motors Corp.*, 376 F.Supp. 620 (S.D.N.Y. 1974).

plaintiff and his clients with expert witnesses to pay them reasonable fees on a contingent basis *are possible*. . . ."

Absent an expert ready to testify for a contingent fee, the case was merely hypothetical because it is just as easy to speculate that petitioner would not be able to obtain an expert ready, willing and able to testify on a contingent fee basis. Since petitioner did not produce such an expert, this controversy was not real and substantial. *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 27, 241 (1937). As in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 91 (1947), "[n]o threat of interference . . . with rights of [plaintiff] appears beyond that implied by the existence of the law and the regulations". The District Court was, thus, without subject matter jurisdiction.

In his Amended Statement pursuant to Rule 9(g) (Resp. App. B) petitioner unsuccessfully attempted to rectify this jurisdictional defect. There he conceded that at the time of the hearing upon his motion, he was *still* "in substantial, present need of locating and retaining experts". Although in his Supplemental Affidavit (Resp. App. C), served on the day of the hearing on his motion for summary judgment, petitioner did claim that an individual named Spector would testify on a contingent fee basis, no agreement with him had yet been reached because Spector desired to know more about the case and what the work entailed.

The District Court in its decision of June 25, 1976, avoided this issue by concluding that the "Rule, unless ignored, must of itself foreclose a lawyer's effort to obtain expert testimony and go far to deny to the lawyer the opportunity to demonstrate the availability of such testimony and its specific place in particular cases". (App. E, p. 23a)

Of course, respondents take issue with this conclusion. DR 7-109C does not and did not prevent plaintiff from arranging with an expert to testify on a contingent fee basis *provided* DR 7-109C was declared unconstitutional. Since he failed to do so, there was no case or controversy.

The Court of Appeals did not address this issue.

II

DR 7-109C Is A Reasonable Exercise Of The Broad Power Which States Have Over Attorneys And The Conduct Of Judicial Proceedings.

(A) DR 7-109C Is A Reasonable Rule.

The basis of petitioner's constitutional challenge to DR 7-109C is that the Rule is irrational and operates to discriminate against those who cannot afford expert testimony and tends to deny to the less affluent access to the courts in cases which, if fairly and fully tried, might be shown to be meritorious. The Court of Appeals rejected this argument and concluded as follows (App. E, pp. 52a-53a):

> "It may be conceded that litigation of difficult and complex matters by persons with small individual stakes in the outcome may be aided and encouraged by elimination of the prohibition against the hiring of experts whose fees may be contingent upon the results. We are not convinced, however, that there is no danger of the inducement of false expert testimony by such contingency arrangements."
>
> "The legislature has made a judgment that the need for discouragement of contingent fee arrangements outweighs the obstacle to financing litigation which a ban on contingent fees may create. We cannot say that this legislative jugment is irrational. The extent of the obstacle and the weight to be given its existence when balanced against the likelihood of false testimony and unfair results from permitting the procurement of expert testimony by the offer of a stake in the outcome are matters of judgment best confided to legislative and judicial bodies of the state."

Disciplinary Rule 7-109C provides as follows:

> "A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
>
> 1. Expenses reasonably incurred by a witness in attending or testifying.
>
> 2. Reasonable compensation to a witness for his loss of time in attending or testifying.
>
> 3. A reasonable fee for the professional services of an expert witness."

The rationale for the proscription against payment of compensation to a witness contingent upon the outcome of the case is manifest. The State of New York, through its judiciary, has concluded by its Appellate Division rules that the presence of the contingency, in and of itself, tends to cause an expert witness to testify as to a particular state of facts or opinion more likely to enhance the chances for a favorable outcome of the litigation so that compensation will be forthcoming (whether a fixed amount or a percentage of the judgment).*

The New York courts had come to this conclusion independently before the rule became included in the Code of

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* Moreover, the courts of the State of New York have refused to enforce the underlying contract between the experts seeking to be paid on a contingent basis and the client on the ground that the contract is against public policy. *Matter of Shapiro*, 144 App. Div. 1, 128 N.Y.S. 852 (1st Dep't 1911). This is the short answer to petitioner's argument that DR 7-109C violates the Equal Protection Clause (Pet. 35) in that, while it prohibits attorneys from engaging experts on a contingent fee basis, it does not prohibit the client himself from hiring an expert for a contingent fee. Such a prohibition is unnecessary. Furthermore, it must be obvious that The Lawyers' Code of Professional Responsibility does not seek to regulate the conduct of non-lawyers.

Professional Responsibility. *Matter of Schapiro,* 144 App. Div. 1, 128 N.Y.S. 852 (1st Dept. 1911); *Matter of Imperatori,* 152 App. Div. 86 (1st Dept. 1912); *Laffin* v. *Billington,* 86 N.Y. Supp. 267 (App. Term, 1st Dept. 1904); *see also Wellington* v. *Kelly,* 84 N.Y. 543 (1881). *See also* the limited decision by a divided court in *Marine Midland Trust* v. *40 Wall Street Corp.,* 13 App. Div. 2d 118 (1st Dept. 1961), *aff'd,* 11 N.Y. 2d 679 (1962), dealing with the approval of appraisers' fees in a court-administered derivative action and Burchill Act reorganization proceeding. Note that even in such a court-administered proceeding, Judge Steuer, in his dissent, thought it unwise to allow the slightest breach in the Rule (p. 132):

> "The authorities collated are, in this State at least, unanimous in their condemnation of any practice which makes the compensation of a witness dependent on the outcome of the litigation. . . . The time of a professional witness can be bought; his opinion should not be vendable."

It is this tendency to false swearing which the Appellate Divisions of the Supreme Court of the State of New York, pursuant to their inherent power to control the conduct of judicial proceedings and pursuant to Section 90(2) of the Judiciary Law, have identified in their Rules as an evil and have proscribed.

An expert, who will be paid in any event, is paid for his time and effort in examining facts and forming an opinion in his given area of expertise. If the opinion of the expert, after such an examination, is unfavorable to the party who engaged the expert, presumably that expert will not be called to testify. But *in any event,* the expert will be compensated for his time and labor; and thus there is no expectation that he will testify untruthfully because of the fee. However, an expert engaged on a contingent basis, no matter how reasonable that fee might be, is in a vastly

different position because he will be compensated only if the outcome of the case is favorable. Thus *the ordinary expectation* is that there will be a tendency to falsify his testimony in order favorably to affect the outcome of the case. This expectation is not irrational.

Numerous states, even prior to the adoption of the Code of Professional Responsibility, recognized the evils inherent in compensating an expert witness on a contingent fee basis. The underlying contract was generally held to be against public policy. Restatement of the Law, Contracts, § 552(2); 14 Williston, Contracts, § 1716, p. 879 (3rd ed. 1972); and 6A Corbin, Contracts, § 1430, p. 379. *See, e.g., Goodyear Tire & Rubber Co.* v. *Overman Cushion Tire Co.,* 95 F.2d 978 (6th Cir. 1938); *Von Kesler* v. *Baker,* 21 P.2d 1017 (Cal. 1933); *Van Norden* v. *Metson,* 171 P.2d 485 (Cal. 1946); *Belfonte* v. *Miller,* 243 A.2d 150 (Pa. 1968); *Laos* v. *Soble,* 503 P.2d 978 (Ariz. 1972); *Wright* v. *Corbin,* 67 P.2d 868 (1937 Wash.); *Pelkey* v. *Hodge,* 296 P. 908 (Cal. 1931); *Henderson* v. *Hall,* 112 S.W. 171 (Ark. 1908); *Burchell* v. *Ledford,* 10 S.W.2d 622 (Ky. 1928); *Bowling* v. *Blum,* 52 S.W. 97 (Tex. 1899); *Duteau* v. *Dresbach,* 194 P.547 (Wash. 1920); *Thatcher* v. *Darr,* 199 P.938 (Wyo. 1921).

Moreover, most, if not all states now have some form of prohibition against the participation of an attorney in paying contingent fees to expert witnesses. The prohibition, contained in the American Bar Association's Code of Professional Responsibility, generally is incorporated in the rules governing the practice of law in each such state or in state statutes.

It was certainly reasonable for the New York Courts to conclude, as have others, that the existence of the contingency in itself tends to cause false testimony and they are well within their power in establishing a prohibition against it.

(B) States Have A Compelling Interest In Regulating The Conduct Of Attorneys That Practice Before Them And Are Free To Regulate The Procedure Of Their Courts.

(1)

It is beyond dispute that states have a compelling interest in regulating the conduct of professionals who practice within their borders. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975); *Bigelow* v. *Commonwealth of Virginia*, 421 U.S. 809, 825 n.10 (1975); *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 336 (1952); *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 611-13 (1935). In *Goldfarb*, this Court, while declaring a minimum fee schedule for lawyers violative of Section 1 of the Sherman Act, 15 U.S.C. § 1, nevertheless acknowledged the great interest which states have in regulating professional activity (421 U.S., at p. 792):

> "We recognize that the States have a *compelling interest* in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions."

It is clear from *Goldfarb*, moreover, that states have an even greater interest in regulating the conduct of attorneys. In his majority opinion, Mr. Chief Justice Burger observed that "[t]he interest of the States in regulating lawyers is *especially great* since lawyers are essential to the primary governmental function of administering justice; and have historically been 'officers of the court.'" *Goldfarb* v. *Virginia State Bar, supra*, 421 U.S., at 792 (emphasis added).

Historically, courts have had supervisory powers over the conduct of attorneys, *Lathrop* v. *Donohue*, 367 U.S. 820 (1961); *Theard* v. *United States*, 354 U.S. 278 (1957);

Powell v. *Alabama*, 287 U.S. 45 (1932); *Ex Parte Secombe*, 19 Howard 9 (1856); *Estates Theatres, Inc.* v. *Columbia Pictures Industries, Inc.*, 345 F.Supp. 93 (S.D.N.Y. 1972); *Rubin* v. *Katz*, 347 F.Supp. 322 (E.D. Pa. 1972). "[I]t may be said that the power of a court to enforce the Code [of Professional Responsibility] is founded on its supervisory power over members of the bar." *Estates Theatres, Inc.* v. *Columbia Pictures Industries, Inc., supra*, 345 F. Supp., at 95 n.1 (Weinfeld, J.). See also *Gair* v. *Peck*, 6 NY 2d 97 (1959), app. dism. 361 U.S. 374 (1960).

(2)

The Rule at issue here rests not merely upon the power to regulate the *conduct of attorneys*, but also upon the power of a state through its judiciary to regulate the *procedures* which govern the conduct of judicial proceedings.

Expert testimony is particularly susceptible to abuse because by its very nature it concerns areas of knowledge with which the ordinary juror and the court are unfamiliar, and since the jury and the court generally rely on this testimony, it is incumbent upon the State to insure that the fee paid to an expert does not cause him to testify falsely. DR 7-109C is a regulatory measure intended to accomplish this purpose.

DR 7-109C is not intended to root out all untruthful testimony. The Rule is directed at a particular problem of trial procedure, namely avoiding testimony by experts with a contingent interest in the outcome of the case. To be sure, the area of expert testimony is not free from difficulties. But respondents respectfully contend that allowing experts to testify on a contingent basis may only exacerbate those problems.

It is well established that a state is free to regulate the procedure of its courts, including its rules of evidence "in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to

be ranked as fundamental". *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934); *Burgett* v. *Texas*, 389 U.S. 109, 113-14 (1967). *See Rideau* v. *Louisiana*, 373 U.S. 723 (1963); *Bute* v. *Illinois*, 333 U.S. 640 (1948); *Brown* v. *Mississippi*, 297 U.S. 278 (1936); *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co.*, 284 U.S. 151 (1931); *Dohaney* v. *Rogers*, 281 U.S. 362 (1930); *Frank* v. *Mangum*, 237 U.S. 309 (1915); *Twining* v. *New Jersey*, 211 U.S. 78 (1908); *Rogers* v. *Peck*, 199 U.S. 425 (1905); *Maxwell* v. *Dow*, 176 U.S. 581 (1900); *Hurtado* v. *California*, 110 U.S. 516 (1884).

It is also established that "[a State's] procedure does not run afoul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser . . ." *Snyder* v. *Massachusetts, supra*, 291 U.S., at 105.

(C) DR 7-109C Is Rational And Does Not Deny Equal Access To The Courts.

Despite the broad power which states have to regulate attorneys and the procedures within their courts, petitioner nevertheless argues that the prohibition against the payment of contingent fees to experts is irrational and constitutes a denial of equal access to the courts. Petitioner has argued that the case is governed by *Boddie* v. *Connecticut*, 401 U.S. 371 (1971) and that *United States* v. *Kras*, 409 U.S. 434 (1973), is inapplicable. The Court of Appeals rejected this analysis and found that there had been no denial of access to the courts because Nabcor Plaintiffs were actually *in court* actively litigating their claim and found petitioner's reliance on *Boddie* misplaced.

Boddie was an action brought on behalf of all those female welfare recipients who resided in Connecticut, and who desired divorces, to declare invalid Connecticut statutes as applied to them which required payment of court fees and costs for service of process as a condition precedent to obtaining a divorce. This Court declared the fees unconstitutional as applied on the ground that they violated due process, but expressed the following caveat (401 U.S., at 382-383):

> "In concluding that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce, we wish to re-emphasize that we go no further than necessary to dispose of the case before us, a case where the bona fides of both appellants' indigency and desire for divorce are here beyond dispute. *We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship.* The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." (Emphasis added)

Thus *Boddie* carefully circumscribed its requirement of access to the courts to situations involving a state-preempted right to dissolve marriage, where resort to the courts was the exclusive means of asserting that right, where the poverty of plaintiffs was conceded and where there was involved a fundamental interest, marriage.

The Court of Appeals placed reliance upon *United States* v. *Kras, supra*, which the District Court summarily dismissed (26a, 51a). *Kras* was a suit brought by an indigent

challenging the constitutionality of certain *government-imposed fees*, fixed by the bankruptcy laws upon filing of a petition in bankruptcy, payment of which was a condition precedent to a voluntary discharge in bankruptcy. Citing *Boddie*, plaintiff Kras claimed that he was unable to pay these fees and thus was not able to obtain a discharge in bankruptcy with the consequence that his Fifth Amendment right to access to the bankruptcy court was abridged.

This Court, however, distinguished *Boddie* holding that Kras' interest in eliminating his debt burden did not rise to the same constitutional level as the dissolution of a marriage and that alternatives were available to him other than the courts. *See Ortwein* v. *Schwab*, 410 U.S. 656 (1973), where Oregon's $25 appellate court filing fee was determined to be neither violative of the Due Process or Equal Protection Clauses; *cf. Lindsey* v. *Normet*, 405 U.S. 56 (1972).

A comparison of *Boddie* and *Kras* leads inexorably to the conclusion that the reasoning of the Court of Appeals is eminently sound. The instant case falls squarely within *Kras* (if, indeed it is an "access" case); *Boddie* is clearly inapposite.*

Unlike *Boddie* and *Kras*, moreover, the Nabcor Plaintiffs were at the time that this action was brought, actually in court actively litigating the Nabcor Action. Since the

* Unlike both *Boddie* and *Kras*, this case does not involve government-imposed fees as a condition of access to the courts. Nor does it involve an indigent. The record is devoid of any facts establishing that any of the individual Nabcor Plaintiffs are impoverished. There is no claim, for example, that they are on welfare. To the contrary, the record shows that certain of Nabcor Plaintiffs are employed, presumably as businessmen, and they are too busy working to testify as experts on their own behalf. Plaintiff's claim is merely that the Nabcor Plaintiffs are "unable" to pay the fees for expert testimony, and not that they are indigents. And unlike *Boddie* and *Kras*, even this claimed inability was not *conceded*.

Nabcor Plaintiffs were beyond the threshold of the court, this is not really an "access" case. In both *Boddie* and *Kras* the fees actually prevented the individuals from commencing the action.

As recognized by the Court of Appeals, *Boddie* is distinguishable from the instant case in a number of additional respects. (App. E, pp. 50a-53a) First, and perhaps foremost, *Boddie* dealt with the marriage relationship which "involves interests of basic importance in our society". 401 U.S., at 376. Here no such basic right is involved. Plaintiff and his clients are merely seeking damages to their businesses for alleged antitrust violations. As stated in *Kras*, "bankruptcy legislation is in the area of economics and social welfare. . . . There is no constitutional right to obtain a discharge of one's debts in bankruptcy". 409 U.S., at 446. Antitrust litigation similarly is in the area of economic and social welfare, and it needs no elaboration that there is no constitutional right to pursue antitrust claims. "Government's role with respect to the private commercial relationship is qualitatively and quantitatively different from its role in the establishment, enforcement and dissolution of marriage." 409 U.S., at 445-46.

In *Boddie*, moreover, this Court emphasized the fact that the state had monopolized the means for legally dissolving marriage and absolutely no alternative existed to effect dissolution. In *Kras*, however, the Court concluded (409 U.S., at 445) that alternatives to judicial proceedings were available. Kras could theoretically have solved his economic problems through private arrangements. Of course, just such a possibility existed in the instant case.

Moreover, the Nabcor Plaintiffs are suing in a *federal* forum and pursuing a *federally-created* right, so there is obviously no state monopolization of the means of asserting the right. *Ross* v. *Moffitt*, 417 U.S. 600 (1974).

(D) DR 7-109C *Is* Not Violative Of The Due Process Clause.

Boddie, according to its majority opinion, was a due process case. Since, as discussed above, resort to the courts in the instant case is not the exclusive avenue for redress, the Due Process decisions cited in *Boddie* have little bearing on the issue *sub judice*. Moreover, it is obvious that the Nabcor Plaintiffs have had an opportunity to be heard. Thus a fundamental requisite of due process has been satisfied. It is also apparent, as discussed earlier, that DR 7-109C is not an arbitrary prohibition.

Even if this were to be deemed a case involving access to the courts, *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949), is controlling. *Cohen* involved a constitutional challenge to a state statute that required security for the reasonable expenses and attorneys' fees which a corporation may incur or for which it may become liable in any stockholder derivative action in which the plaintiff's interest as a shareholder is less than 5% of the value of all outstanding shares and has a market value of less than $50,000. Plaintiff argued (337 U.S., at 552) that the security requirement violated due process because it "foreclose[d] resort by most stockholders to the only available judicial remedy for the protection of their rights". This Court was unpersuaded (p. 552):

> "A state may set the terms on which it will permit litigations in its courts. . . . Of course, to require security for the payment of any kind of costs or the necessity for bearing any kind of expense of litigation, has a deterring effect. But we deal with power, not wisdom; and we think, notwithstanding this tendency, it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met."

(E) DR 7-109C Does Not Violate The Equal Protection Clause Of The Fourteenth Amendment.

The essence of petitioner's Equal Protection argument before the Court of Appeals was that DR 7-109C established an irrational classification based on wealth: those able to pay expert witnesses reasonable fees do not need to resort to contingent fee arrangements, while those unable to pay these fees are denied the opportunity to have expert testimony and thus are denied equal protection of the law.

Wealth discrimination, however, is not a suspect classification such that strict judicial scrutiny is required. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976). See *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973) holding (p. 29):

> "this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny".

Since there is no fundamental right to litigate antitrust actions, the instant case involves solely wealth discrimination. Thus, strict judicial scrutiny is not required. Moreover, "[d]ifferences in ease of access to the courts have not been held to implicate such fundamental rights that the state must show a 'compelling state interest' to support any differentiation". *Manes* v. *Goldin*, 400 F.Supp. 23, 29 (E.D.N.Y. 1975), *aff'd*, 423 U.S. 1068 (1976), upholding the constitutionality of New York State statutes raising court filing fees and charges in New York City.

It follows that the standard to be applied in this case is that of rationality, and as demonstrated, DR 7-109C is clearly rational. *McGowan* v. *Maryland*, 366 U.S. 420, 426-46 (1961).

(F) DR 7-109C Does Not Interfere With First Amendment Freedoms

As part of his broad based challenge to the Rule's constitutionality, petitioner advances the argument that DR 7-109C violates the First Amendment. (Pet., pp. 46-49) Petitioner proceeds on the theory that he is a "private attorney general" and lawsuits brought to enforce the antitrust laws are associational political activity similar to that protected in *NAACP* v. *Button,* 371 U.S. 415 (1963). Suffice it to say that the District Court ignored the argument, doubtless finding it completely devoid of merit, and the Court of Appeals likewise rejected it, stating (App. 53a-54a):

> "The New York rule is not analogous to a Virginia statute regulating the solicitation of legal business which the Supreme Court struck down in *NAACP* v. *Button,* 371 U.S. 415 (1963), cited by appellee. In contrast to the Virginia statute invalidated in *NAACP* v. *Button,* the New York disciplinary rule is specific, not subject to selective enforcement because of vagueness, and its effect on first amendment rights, if any, is remote. DR 7-109C does not deny attorneys or their clients access to the courts—it merely forces attorneys and litigants to finance the payment of experts in a manner not related to the outcome of the litigation. Courts have for centuries possessed disciplinary powers incident to the administration of justice. *NAACP* v. *Button, supra,* 371 U.S. at 456 (Justice Harlan dissenting). DR 7-109C is a proper exercise of such a power."

As to the balancing of interests argument advanced by petitioner (Pet. 48), we suggest that such an argument and the weight to be attributed to it should be addressed to the agencies responsible for the enforcement of the Disciplinary Rule, rather than to a federal court. A balancing was performed by the State in adopting DR 7-109C. Any revision should be accomplished by a legislative process, where all

of the factors suggested by the petitioner may be given appropriate consideration, after hearings if necessary, rather than by constitutional dictate. The federal courts should not substitute their judgment, as to the most desirable method of regulating the legal profession, for the judgments of the state agencies entrusted with that responsibility. Even tested by a standard of strict judicial scrutiny, the disciplinary rule is constitutional by reason of the compelling interest which the State has in regulating the standards of an attorney's professional conduct.

Conclusion

It is respectfully urged that the basis for DR 7-109C is rational and that the prohibition is a proper exercise of state power. It is not unreasonable for the State of New York to have followed its own common law rule, and after mature consideration by both The American Bar Association and the New York State Bar of Rule DR 7-109C to have concluded in Appellate Division Rules 603.2 (1st Dept.) and 691.2 (2d Dept.) that the existence of the *contingency* (payment of fees based upon the *outcome* of a litigation) in and of itself, regardless of whether the contingent fee may be reasonable, tends to cause false testimony and should be prohibited.

The petition for a writ of certiorari should be denied.

Dated: New York, New York
October 11, 1977

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-389

CARL E. PERSON,

Petitioner,

v.

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Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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This reply by petitioner, under subparagraph 4 of Rule 24 of the Rules of the Supreme Court, is addressed to arguments first raised in the brief in opposition. Respondents' brief raises issues rejected by the District Court

and Court of Appeals, both of which reached the present constitutional issues. Petitioner's response to these non-constitutional issues being raised by Respondents follows:

I. NO FACTUAL ISSUES

There are no factual issues, contrary to the assertion at pp. 4-5 of Respondents' brief. Respondents filed no affidavits in opposition to Petitioner's motion for a summary declaratory judgment or at any other time (except attorneys' affidavits) and chose not to notice or otherwise request discovery at any time, apparently to avoid raising any factual issues. The record reflects no oral requests for discovery at any time. Respondents' claim of discovery denial was raised and heard in the Court of Appeals, and rejected.

II. AVAILABILITY OF 3 EXPERTS TO TESTIFY FOR CONTINGENT FEE

Petitioner had more than one expert willing to testify on a contingent-fee basis, contrary to the assertion at pp. 6-8 of Respondents' brief. Three different prospective expert witnesses (Mr. Spector - accounting; Mr. Siegel - accounting; and Mr. Seplaki - economist) had advised petitioner they would be willing to perform expert services and testify as expert witnesses for the Nabcor Plaintiffs on a contingent-fee basis, assuming DR 7-109C was not a barrier, but they wanted to learn more about the nature of the Nabcor action before deciding to enter into an agreement to provide the desired services.

Judge Dooling said that DR 7-109C makes it difficult for persons in petitioner's position to enter into any agreements with prospective expert witnesses

(22a-25a) and the Second Circuit said that Respondents' argument was without merit (Note 6 at 62a). Respondents' assertion at p. 8 of their brief that the Court of Appeals did not address the issue is clearly erroneous.

III. ONLY ONE OF THE VARIOUS SEVERED NABCOR ACTIONS HAS BEEN TRIED

The Nabcor action has not ended, contrary to the implication at p. 6 in Respondents' brief. The Nabcor action was severed into various actions, and only the first severed part, against GM, GMAC, a dealer association and 5 GM dealers, was tried October-December, 1976. The "other phases of the case remain to be decided". Judge Griesa's bench opinion, 1976-2 Trade Cases ¶ 61,211, at p. 70,511. The first part (the GM action) is on appeal in the Second Circuit, under Docket No. 77-7037.

IV. PRIOR NEW YORK CASE LAW PERMITTED SOME CONTINGENT-FEE ARRANGEMENTS WITH EXPERTS

Matter of Shapiro, 144 App. Div. 1, 128 N.Y.S. 852 (1st Dept., 1911) does not hold that contingent-fee arrangements with experts are illegal in New York, contrary to the assertion in the footnote at p. 9 of Respondents' brief. The case involved testimony by an attending physician. The physician was not an expert witness because the attorney was unable to establish liability without testimony from this particular physician. Accordingly, he was needed to testify as to certain facts that only he had observed, and his testimony could have been obtained by subpoena. The contingent-fee arrangement was not called to the court's attention. 144 App. Div. 6. The dictum at 141 App. Div. 10 does not say that all contingent-fee arrangements in New York are

illegal. In light of the facts, it appears to mean that contingent-fee arrangements are illegal when the witness is being paid to falsify his testimony.

The Marine Midland case, cited at p. 37 in petitioner's brief, is a 1961 decision of the First Appellate Division, permitting a contingent-fee arrangement for the expert witness involved. Clearly, New York's rule prior to adoption of the DR 7-109C in 1969 was to permit some types of contingent-fee arrangements with expert witnesses, but adoption of DR 7-109C by the ABA in 1969, followed by automatic adoption by the New York State Bar Association and the Appellate Divisions, effective January 1, 1970, changed such forward-looking direction. In other words, the Appellate Division, when it considered the matter, upheld some use of contingent fees for expert witnesses.

V. NO BALANCING OF INTERESTS BY ANY NEW YORK STATE AGENCY

New York State did not balance the competing interests, contrary to the assertion at pp. 9, 11 and 20 of Respondents' brief. DR 7-109C was adopted automatically, without any balancing of interests, by the New York State Bar Association and the New York Appellate Divisions. The New York Appellate Divisions have made no showing that they even were aware of DR 7-109C when the Code of Professional Responsibility was adopted, by reference; en toto. None of the Respondents has attempted to show that any of them performed any balancing of interests.

VI. NABCOR PLAINTIFFS CANNOT PAY FOR NEEDED EXPERT WITNESSES

The Nabcor Plaintiffs are impoverished, contrary to the assertion at p. 16 of Respondents' brief. The record clearly shows without contradiction that the Nabcor

Plaintiffs do not have the resources needed to pay for the services of the expert witnesses needed by them and that the Nabcor Plaintiffs in fact did not use expert witnesses because of their inability to pay the fees requested by various experts, which resulted in a loss of the preliminary injunction motion made by the Nabcor Plaintiffs in 1973, as well as the trial itself (which loss could have been prevented by having expert witnesses testify on the ultimate issues of liability and damages). (It should be understood that the Nabcor Plaintiffs are maintaining, with great justification, that their action against GM was improperly dismissed, for various reasons, including the sufficiency of evidence.)

VII. NONE OF THE NABCOR PLAINTIFFS WERE EXPERTS THEMSELVES

None of the 10 Nabcor Plaintiffs could have been expert witnesses themselves,

contrary to the assertion in the footnote at p. 16 of Respondents' brief. The record does not show that any of the Nabcor Plaintiffs was qualified to testify as an expert witness in any of the areas of expertise in which expert testimony was needed.

Significantly, Respondents failed to respond to petitioner's argument that various types of contingencies, such as substantial continuing business relationships with the employing attorney or his client, are not prohibited by DR 7-109C. The end result is irrational — that wealthy litigants are permitted to use expert witnesses who have an economic interest in their own testimony whereas poor litigants, who usually have only one type of contingency available (the contingent-fee arrangement) are prohibited from using such contingency. This prohibition adds unnecessarily and substantially to the

existing burdens of poor litigants in the judicial system where the ability to obtain "justice" too frequently depends on the size of the litigants' bank account.

CONCLUSION

DR 7-109C should be declared unconstitutional absolutely, or unless and until the rule is amended to include a prohibition of other types of contingencies, as well.

WHEREFORE, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 11, 1977